The Central Law Journal.

ST. LOUIS, APRIL 29, 1881.

CURRENT TOPICS.

Leddell v. McDougal, recently decided by the English Court of Appeal, is of interest upon the question of liability for misrepresentations as to the solvency of another, where no actual fraud was intended. The facts of the case were as follows: The plaintiff, Leddell, being about to grant a lease to one Thornton, wrote to the defendant, McDougal, to whom he had been referred by Thornton, saying: "Thornton is desirous of leasing premises from us, of about the annual value of £400, * * * and we will be glad if you will say if you know him to be in good and responsible position, to meet the responsibility of such an undertaking, and if you can recommend him as a safe and advisable tenant." McDougal answered: "I have much pleasure in replying affirmatively." On the strength of this answer, Thornton was accepted as tenant, but afterwards deserted the premises without paying any rent. McDougal, when he answered as above, was well acquainted with the antecedents of Thornton, and knew him to be a person of no substantial means, who had twice previously failed in business similar to that which he intended to carry on upon the premises in question; but he had no positive intention to deceive the plaintiff. Upon these facts it was held, reversing the decision of vice-chancellor Bacon, that the defendant was liable. As to the question of the fraudulent intent, Jessel, M. R., adopted the language of Lord Kenyon in Haycraft v. Creasy, 2 East, 103: "It is said that I imputed no fraud to this defendant at the trial. It is true that I used no hard words, because the case did not call for them. It was enough to state that the case rested on this: that the defendant affirmed that to be true within his own knowledge, which he did not know to be true. This is fraudulent not perhaps in that sense which affixes the stain of moral turpitude on the mind of the party, but falling within the notion of legal fraud, such as is preserved in all cases within the statute of frauds. The fraud consists, not in the defendant saying that he believed the matter to be true, or that he had reason to believe it, but in asserting positively his knowledge of that which he did not know."

The *Weekly Jurist* of Bloomington, Ill., announced in its issue of April 21, its discontinuance, "owing to the great difficulty in making collections." The fate of this paper, which was not without a very considerable excellence, might be made the subject of some very sage remarks in the way of friendly warning to those gentlemen who are fired with the ambition of solving the problem of whether the bar of a particular State, or of a particular locality in a State, is sufficiently numerous and progressive to support a local law journal. It is, however, not worth while to indulge in that sort of philanthropy, for the reason that people who are infected with that kind of madness, are not usually amenable to argument of any other nature than the brutal checkmate of experience. Legal journalism is as yet in its infancy, and it is difficult to set the limits precisely to its field of usefulness, and say just what objects should be sought to be accomplished by it. For our own part we are convinced, that while on the one hand it cannot usurp the office of the text writer, and retail treatises to its readers, on the other it cannot take the place of the official reports, which is about what has been attempted in many instances by the local law journals. Its real and appropriate work lies somewhere between these limits.

A decision of the English High Court of Justice in the famous "Emma Mine" case, is authority for the doctrine that the claim of a company against a promoter (who, by the way, was the notorious Mr. Albert Grant), for money received by him under undisclosed contracts, is a liability incurred by means of fraud and breach of trust within the meaning of the English Bankrupt Act, and that his discharge would not have the effect to release him from it, and that he must pay it.

THE DOCTRINE OF ULTRA VIRES; UNDER WHAT CIRCUMSTANCES AND IN WHOSE FAVOR IT IS APPLICABLE.

An act of a corporation, or of its agents, is described as being *ultra vires* when it is beyond the chartered powers of the corporation. The limitations of corporate power form the ground work of the doctrine now under discussion. A corporation is an artificial being created by law. It derives all its power from its charter, and has only such powers as are thereby expressly or impliedly given. But to accomplish the purposes of its creation, it by implication has, to a large extent, the powers that an individual would have in the same position.[1] For example: the power to borrow money and give the usual obligations therefor, is an acknowledged incident of a private corporation.[2] The question of whether a particular act or contract is *ultra vires*, is to be determined by a consideration of the charter of each corporation. The present inquiry, though, will be directed, not to ascertaining when an act of a corporation exceeds its powers, but what is the effect of an act which does exceed its powers, upon the rights of the parties. In the succeeding pages no detailed examination of the English doctrine has been attempted. I have contented myself with a reference to certain rules that have had an important bearing on the adjudications in this country.

The English doctrine on this subject might be summarized thus: Corporations are created for fixed purposes, with certain specified powers. It is deemed to be public policy to keep them strictly within the bounds so defined. There is an implied prohibition to go beyond such limits. And all persons dealing with a corporation are charged with notice of the limitations upon its authority. Therefore, every contract of a corporation, or its agents, which exceeds the powers of the corporation, violates this implied prohibition, and contravenes such public policy, and is illegal and void. Consequently as to such contracts there can be no ratification or estoppel.[3] Leake (Contracts, 602) lays down the rule that "a contract that is *ultra vires* of the company, can not be ratified even by the unanimous assent of the whole body of stockholders." But this doctrine is to be confined, in the language of Lord St. Leonards, in Eastern Cos. R. Co. v. Hawkes,[4] "to clear cases of excess of power, with the knowledge of the other party, express or implied, from the nature of the corporation and the contract entered into."[5]

What constitutes illegality in our law of corporations? Does every act which transcends the powers conferred, violate public policy and a consequent implied prohibition? These questions demand some inquiry into the state of things on which the older rule was founded, and the changes that it is believed have taken place. In the early history of the law of corporations, and up to a comparatively recent period, they were created only by royal charter or special act of the legislature, in which the purposes and objects of the corporation (which were usually of a general and public nature), and its powers, were specifically enumerated and defined. The franchise was a special privilege, granted at the public expense, and in the proper adherence to which the public had a direct interest. It gave them "great advantages over mere private citizens, whether individual or associated. They were looked upon with suspicion, as bodies created by the government with privileges not common to the people at large;—statutes of mortmain were passed. Under such circumstances — with each charter viewed as an encroachment on public right for the benefit of particular individuals—it was but just to consider every advance beyond what the law had authorized as a violation of the corporation's duties to the public, and against the policy of the government. Such a rule was based on solid reasons.[6]

What is the position of affairs now? Instead of the special act creating a single corporation, our statute books are full of general

1 Field, Corp., § 271; Thompson v. Lambert, 44 Iowa, 239, 244.

2 Field, Corp., secs. 249, 271; Stratton v. Allen, 16 N. J. Eq., 229.

3 East Anglian Ry. Co. v. Eastern Cos. Ry. Co., 11 C. B. 775; McGregor v. Deal. etc. R. Co., 18 Q. B. 618; Leake, Contracts. 582, *et seq.*; 5 Am. L. Rev. 272, 282, article by O. W. Holmes, Sr.

4 5 H. of L. C. 331, 373.

5 Green's Brice's *Ultra Vires*, (2d ed.), 39 *et seq.*

6 Selden, J., in Bissell v. R. Co., 22 N. Y. 286-8.

laws providing that on the perfection of certain formal steps, persons may become incorporated for almost every conceivable purpose. The purposes and objects of the corporation are no longer specifically defined in the act of the legislature, but, within a very broad range, are left to the determination of the parties, and are set forth in the articles of incorporation. Substituted, quite frequently, for the statutes of mortmain, are provisions enabling corporations to purchase, hold and transfer real property without restriction. The corporation would seem to be for many purposes a chartered partnership. The entity, distinct in law from the corporators, enables a large number of individuals, without reference to personal qualifications, to combine their means in the prosecution of a common purpose. But this privilege is open to the whole public. Can it be said that, with such altered conditions, the same rule should continue? *Cessante ratione legis, cessat ipsa lex.*[7]

The reason for the rule no longer exists in this country; and it is submitted that, by the weight of authority, there is no implied prohibition of, nor is public policy violated by, corporate acts simply *ultra vires*, and, therefore, they are not illegal.[8] In Union National Bank v. Matthews,[9] decided by the Supreme Court of the United States in January, 1879, reversing the Supreme Court of Missouri,[10] the defendant was not permitted to plead that the deed of trust was *ultra vires;* and Mr. Justice Swayne, in delivering the opinion of the court, after referring to a judgment of ouster and dissolution as the punishment the State had provided for a violation of the charter, said; "A private person can not directly or indirectly usurp this function of government." Oil Creek, etc. R. Co. v. Pa. Transp. Co.,[11] decided in 1876, is a strong case to the same effect; the corporation there being held estopped to make the defense.[12] Illegality may be taken advantage of by either party to the contract;[13] consequently, these are all decisions against the illegality of contracts merely *ultra vires.*

Another question arises as to *quasi* public and municipal corporations. The former—railroads, etc.,—are invested with important public functions; and any attempt to use the power of eminent domain unauthorizedly,[14] or any contract that would conflict with the duties that are imposed upon such corporations as the price of their extraordinary privileges,[15] would violate public policy and be illegal and void.[16] *A fortiori* may it be said that municipal corporations, exercising such vital governmental functions, as they do, can not go beyond the limit the law has fixed, without endangering public interests. A contract a

[7] Comstock, J., in Bissell v. R. Co., 22 N. Y. 270, 271, 277, 278; Converse v. Norwich, etc. R. Co., 33 Conn. 166, 180.

[8] See cases cited in next paragraph, and in notes 12, 19, 29, 30 and 31. The case of Franklin Co. v. Lewiston Sav. Bk. 68 Maine, 43, decided in 1877, adheres to the old rule, and is the only recent case that I have been able to find that does so. It was an extreme case. The trustees of a savings society, although at the time having no funds for investment, subscribed for $50,000 of stock in a manufacturing company. Not being able to pay for it, the Franklin Co., whose treasurer also held the same position in the manufacturing company, paid the money to himself as treasurer of the latter, and took, therefor, the notes of the savings society, secured by the stock, which was issued directly to the Franklin Co., as collateral. The savings society received no benefit whatever from the stock. Suit being brought by the Franklin Co., upon the notes, the Supreme Court held the contract *ultra vires*, and, therefore, illegal and void. It is suggested that the contract really falls within the class which violates public policy, spoken of hereafter. The trustees of a savings society stand in a peculiar and delicate trust relation towards depositors, and any such abuse of their trust as this case exhibits, is thoroughly repugnant to the purpose and policy of the State in creating such societies. Besides, the Franklin Co. was a party to the breach of trust. Nevertheless, the case proceeds upon the idea, so clearly laid down by Justice Selden in the Bissell case, that "the contracts of corporations which are not authorized by their charters are illegal, because" public policy requires corporations to keep within the limits of their charters. It is believed, however, that the weight of authority in this country, and the reason of the thing, are opposed to that doctrine.

[9] 98 U. S. 621; s. c. 8 Cent. L. J. 131; see, also, article in 9 Cent. L. J. 463.

[10] 3 Cent. L. J. 606.

[11] 83 Pa. St. 160, 166.

[12] And see further where the corporation or other party held estopped to plead *ultra vires*, although contract clearly beyond powers. Whitney Arms Co. v. Barlow, 63 N. Y. 62; State Board of Agric. v. Citizens' St. R. Co. 47 Ind. 407; also Hays v. Galion, etc. Co. 29 Ohio St. 330, 340; and cases referred to in notes 19, 29, 30, and 31.

[13] 2 Chitty Contracts, (11 Am. Ed.) 975.

[14] See Mahoney v. Spring Valley Water Works, 52 Cal. 159; Pollock's Contracts (Wald's Ed.), 95-96.

[15] As, for instance, an unauthorized alienation by a railroad company of all its property and franchises. Thomas v. Railroad Co., 101 U. S. 71, 83-84: N. Y., etc. R. Co v. Winans, 17 How. 30; Black v. Del., etc. Can. Co., 22 N. J. Eq. 130; A. & P. Tel. Co. v. U. P. R. Co., 1 Fed. Rep. 745, 747-752; Board of Com. v. L. M. & B., etc. R. Co., 50 Ind. 85, 108-109.

[16] Pollock, Contracts (Wald's ed.), 95-96.

municipal corporation can not make under any circumstances, violates public policy, and is illegal and void.[17] As to the class of cases that really falls within the doctrine of public policy, it may be said that corporate contracts, *ultra vires*, which are positively prohibited either by the charter or the general law, or are against public policy, are illegal and void; and either party to the contract may make the defense. They can not be ratified or be the subject of an estoppel.[18] But even this doctrine is not unlimited. It is to be considered with reference to whether the legislature, by its prohibition, intended to altogether avoid the contract, or whether it was a rule for the government of the corporation, a violation of which was to be punished by the State. And in the latter class of cases, if one party has fully executed his portion of the agreement, the other will not be permitted to escape liability by the plea of *ultra vires*.[19] The various States have different systems of incorporation, and questions of public policy will arise under them; but they must be determined by the design and tendency of each system. In Ohio, it has been decided in Straus v. Eagle Ins. Co.,[20] to be "directly opposed to the leading objects" of the incorporation of insurance companies to permit them to purchase and use the notes of their assured, as a set-off against losses. Except as to such cases, the same rules are to be applied, that govern as to individuals. When the prohibition is upon the corporation making the contract, and not upon the person receiving it, the consideration may be recovered.[21]

As to executory contracts, the rule is different. The right of a stockholder, or, under certain circumstances, of a creditor, or, as to municipal corporations, of property holders or taxable inhabitants, to restrain the corporation or its officers from doing acts and entering into contracts *ultra vires*, is fully established. And so long as an unauthorized contract remains purely executory,—so long as the parties can be placed in *statu quo*—its completion may be enjoined. The writ of injunction is an effectual remedy to prevent the misappropriation and diversion of corporate funds to unauthorized purposes.[22] Neither will the courts enforce such contracts, and damages can not be recovered for a refusal to fulfill.[23] In other words, as to *ultra vires* contracts which are wholly unexecuted, or those as to which the parties may be placed in their former position, the plea of want of power is always available.

There is a class of cases in which there is an apparent power to make the contract about which the controversy arises; and here the question of authority depends not merely on the provision of law authorizing the contract, but also on extrinsic facts. In favor of a person without notice that the exercise is for a purpose, with an intent, or under circumstances unauthorized, the corporation will be held estopped to plead *ultra vires*. And the stockholders will stand in no better position than the corporation. The exercise of the power by the proper officers is considered a representation that the facts exist which warrant it.[24] Upon this principle is established the rule that "when a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder, than any other commercial paper;" and this rule is applied as well to municipal

[17] Thomas v. City of Richmond, 12 Wall. 349, 356-7; Mayor v. Ray, 19 Ib. 468.

[18] Morris, etc. R. Co. v. Sussex R. Co., 20 N. J. Eq. 542; N. Y., etc. Ins. Co. v. Ely, 2 Cow. 678; Utica Ins. Co. v. Scott, 19 Johns. 1; Rutland, etc. R. Co. v. Proctor, 29 Vt. 93; Redfield, J.

[19] Union Nat. Bank v. Matthews, 98 U. S. 621; s. c. 8 Cent. L. J. 131; Lake Bank v. North, 4 Johns. Ch. 370. Kent Ch. And one who has borrowed money from a national bank, can not set up as a bar to an action therefor, that the loan exceeded the amount it was permitted to loan; (Gold Min. Co. v. Nat. Bank, 96 U. S. 640; O'Hare v. Nat. Bank, 77 Pa. St. 96); or that an insurance company had loaned money for a longer period than authorized. Germantown, etc. Ins. Co. v. Dhein, 43 Wis. 420; *contra*, Crocker v. Whitney, 71 N. Y. 161.

[20] 5 Ohio St. 59, 65.

[21] Hunt, J., in Mayor v. Ray, 19 Wall. 484; Oneida Bank v. Ontario Bank, 21 N. Y. 490; 15 N. Y. 94; Field Corp., § 268; see, also, Vanatta v. State Bank, 9 Ohio St. 27.

[22] Dodge v. Woolsey, 18 How. 331, 341-5; Dillon Mun. Corp., § 731; Field Corp., §§ 264, 271, 273; Thompson v. Lambert, 44 Iowa, 239; Leake, Contracts, 588.

[23] Screven Hose Co. v. Philpot, 53 Ga. 625; Field Corp., sec. 264; Thomas v. R. R. Co., 101 U. S. 71; Field Corp., sec. 264.

[24] Miners' Ditch Co. v. Zellerback, 37 Cal. 543, 586-7, 595; Bigelow Estoppel, 423; Potter Corp., sec. 549; 2 Kent, 300, Holmes' Note; Ossipee, etc. Co. v. Canney, 54 N. H. 295, 325-6; Lord Campbell, in Mayor v. Norfolk R. Co., 30 Eng L. & Eq. 128, 143-4; Fountaine v. Carmarthen R. Co., L. R. 5 Eq. 316, 322.

as private corporations.[25] The doctrine is now well settled by a long line of decisions in the Supreme Court of the United States, that where the legislature has authorized a municipality to issue bonds upon the performance of certain conditions, and has intrusted their execution and issue to designated officers, a recital in bonds issued by such officers, that the provisions of the law had been complied with, is conclusive upon the corporation as against a *bona fide* holder for value.[26]

Having considered the cases where the corporation is estopped to deny its apparent power, the next inquiry is as to the effect of contracts clearly *ultra vires*—those which, on their face, by comparison with the charter or articles of incorporation, appear to be unauthorized. May the corporation, as to such, be estopped to plead its want of power? It has been repeated so often, that it is almost a maxim, that a person dealing with a corporation, is bound to take notice of its powers. Its character, articles of incorporation, and acts granting particular powers are matters of public record open to the inspection of all. This doctrine is necessary for the protection of stockholders and creditors. The foregoing *quære* is to be answered in the light of these conditions. Let us facilitate the work by dividing the subject, and consider first, private corporations, and secondly, municipal corporations.

1. *Private Corporations.* It has been seen that a contract is not illegal simply because it exceeds the powers of the corporation. Is there, then, an absolute incapability on the part of a corporation to do an act which transcends the powers the law has given it? That there is, would, perhaps, theoretically speaking, be correct; but, as has been well said, such a proposition savors too strongly of metaphysics. The well-settled liability of the corporation for torts and in cases of apparent power, is inconsistent with such a doctrine.[27] Justice Selden, in the Bissell Case,[28] expressly negatived the idea that this was the ground upon which the defense of *ultra vires* was based. That a corporation may do acts in excess of its authority, is deemed to be too well settled to call for further discussion. When, then, is the corporation liable for its *ultra vires* contracts?

The proposition would seem to be established by the more recent decisions, that where a contract has, in good faith, been fully performed either by the corporation or the other party, the one who has received the benefit will not be permitted to resist its enforcement by the plea of mere want of power.[29] Thus the corporation has been held estopped to plead *ultra vires* to an action on the contract, where it had been performed by the other party and the corporation had received the benefit, although clearly beyond its power.[30] And *e converso*, the other party has been held estopped where the corporation had performed the contract.[31] The rule has been

[25] Gelpcke v. City of Dubuque, 1 Wall. 175 203; 21, How. 539; 5 Wall. 784; 14 Ib. 296; Town of Coloma v. Eaves, 92 U. S. 484, 490-3; Royal Bank v. Turquand, 6 Ell. & Bl. 327; (accommodation note); Monument Nat. Bank v. Globe Works, 101 Mass. 57; (accommodation guaranty of railroad bonds); Mad. etc. R. Co. v. Norwich, 24 Ind. 457; 11 Paige Ch. 635; 16 N. Y. 125; 55 Ills. 413; 44 Iowa, 239; Field, Corp., sec. 270; see cases cited in note 37; see *contra*, McPherson v. Foster, 43 Iowa, 48.

[26] Jones' Rail. Secur., sec. 287-295; Dillon, Monogram on Municipal Bonds; Town of Coloma v. Eaves, 92 U. S. 484, and cases in same vol., pp. 494, 502, 631, 637, 642; 96 U. S. 412. But where the recital refers to a statute, and reference to it will show that the law has not been complied with, a holder is held to have notice, and is ot protected. McClure v. Oxford Township, 94 U. S. 429.

[27] See article on Ultra Vires, by G. H. Wald, Esq., in 6 Cent. L. J. 2.

[28] 22 N. Y. 282-3.

[29] Cases referred to in notes 30, 31, 19: Darst v. Gale, 83 Ill. 136; Lawrence, C. J., in Bradley v. Ballard, 55 Ill. 417; Field, Corp., § 273; Cozart v. Ga. R, R. Co., 54 Ga. 379; A. & P. Tel. Co. v. Union, etc. R. Co., 1 Fed. Rep. 745; Dimpfel v. O. & M. Ry. Co., 8 Reporter, 641; Hitchcock v. Galveston, 96 U. S. 341; City of Natchez v. Mallery, 54 Miss. 499; Thompson v. Lambert, 44 Iowa, 239; Pittsburgh &c. R. R. Co. v Allegheny Co., 79 Pa. St. 210, 215-16, Gordon, J; Watt's Appeal, 78 Pa. St. 370, 392-5; De Groff v. Am. Lin. Th. Co., 21 N. Y. 124, 127-8, Bacon, J; Galion &. Co. v. Hays, 29 Ohio St. 330, 340; Ry. Co. v. McCarthy 96 U. S. 258, 267; see very complete collection of the authorities, Green's Brice's *Ultra Vires* (2nd Ed.) 729, note *a*. *Contra*—older cases—which cannot now be considered as the law, except, in some instances, in their own States: Hood v. N. Y. etc. R. Co. 22 Conn. 502 (but see Converse v. Norwich etc. Co.. 33 Conn. 166, 180); Pa. etc. Co. v. Dandridge, 8 Gill. & J., 248; Downing v. Mt. Wash. etc. Co., 42 N. H. 230; (not illegal, but no power to make) Pres. etc. Hos. v. Foreman, 29 Md., 524; Bank of Chillicothe v. Swayne, 8 Ohio, 257 (but see 29 Ohio St. 330; Ib. 341; 27 Ohio St. 343).

[30] Oil Creek etc. R. R. Co. v. Pa. Transp. Co., 83 Pa. St. 160; State Board of Agric. v. Citizens' St. Ry. Co., 47 Ind. 407.

[31] Whitney Arms Co. v. Barlow, 63 N. Y. 62; Newburg Pet. Co. v. Weare, 27 Ohio St. 343. 353-4; Chester Glass Co. v. Dewey, 16 Mass., 94, 102; Gold Min. Co. v. National Bank, 96 U. S. 640; National Bank v. Matthews, 98 U. S. 621; s.c., 8 Cent. L. J. 131.

well stated by Sedgwick:[32] "Where it is a simple question of capacity or authority arising on a question * * of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity."[33]

In this class of cases, from the receipt of the benefit, the acquiesence and assent of the stockholders is presumed. And where disputed, it will be sufficient, it is said, to show "circumstances from which it may be reasonably inferred that the contract to be ratified was within the knowledge of all those who chose to inquire, and the stockholders had full opportunity and means of inquiry."[34] In favor of dissenting stockholders who have had no knowledge of an *ultra vires* contract, and therefore no opportunity to interfere by injunction, the right to disaffirm the contract may well be maintained; a person dealing with a corporation through its officers being charged with notice of its powers, he becomes a party to a breach of trust. It is apprehended that the rules of agency, with such modifications as may be necessary in view of the peculiar character of corporations and of the relation of trustee and *cestui que trust* existing between the officers and stockholders, will solve such questions. Whenever it is a mere question of power, if there can be no recovery on the contract, the consideration paid may be recovered back.[35]

2. *Municipal Corporations.* The public nature of these corporations gives rise to an entirely different rule as to them. Judge Dillon[36] states it thus: "The general principle of law is settled that the agents, officers, or even city council of a municipal corporation, cannot bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation." "It results from this doctrine that unauthorized contracts are void, and in actions thereon the corporation [or the other party, sec. 282] may successfully interpose the plea of *ultra vires.*" * * It may always show that under no circumstances could the corporation lawfully make a contract of the character in question."[37]

As to Torts there is no longer any question of the liability of a private corporation. It is liable "in the same manner and to the same extent that individuals are liable under like circumstances."[38] But the rule as to municipal corporations is very different. "If the act complained of lies wholly outside the general or special powers of the corporation as conferred in its charter or by statute, the corporation can in no event be liable, whether it directly commanded the performance of the act, or whether it be done by its officers without its express command."[39]

J. C. HARPER.

32 Stat. and Const. Law (1st Ed.) 90.

33 Cited with approval in Nat. Bank v. Matthews, 98 U. S. 621, 629.

34 Jones, Rail. Secur., § 356; Cozart v. Ga. Ry. etc. Co., 54 Ga. 379.

35 Morville v. Am. Tract So., 123 Mass. 129; White v. Franklin Bk., 22 Pick. 181; Field, Corp., §§ 266, 273; and where the money was used to pay off creditors, may be subrogated to the rights of such creditors: White v. Carmarthen Ry. Co., 1 H. & M. 786; Cork & N. Ry. Co. L. R. 4 Ch. 748, 761; 5 Am. Law Rev. 284-5.

36 Municipal Corporations, § 381.

37 But where the objection arises by reason of the contract being for a length of time, or to be performed in a manner that is not authorized, or in cases falling under the head of apparent power, the corporation receiving the benefit will not be permitted to make the defense of *Ultra Vires* against those who have performed their part of the contract to the extent of such performance. E. St. Louis v. E. St. L. Gas Light etc. Co., (Sup. Court Ill., Feb., 1881), 12 Cent. L.J. 178; Hitchcock v. Galveston, 96 U. S. 341, and cases cited in notes 24, 25 and 26, *supra.*

38 Merchant's Bk. v. State Bk., 10 Wall. 604; Nat. Bk. v. Graham, 100 U. S. 609; Bissell v. R. R. Co., 22 N. Y. 258; 40 N. Y. 168; 50 N. Y. 396; Green's Brice's *Ultra Vires*, 263 n.

39 Dillon, Mun. Corp., § 766; Wheeler v. Essex Pub. Rd. Board, 39 N. J. Law, 291, 295.

THE LAW OF THE THEATRE.

The theatre has its laws as well as other institutions. If it were otherwise, and the gentlemen of the "profession" had their own way, they would, no doubt, throw over any engagement when it suited them; the leading lady would play "Juliet" or nothing, and the manager would find himself considerably "left" in the middle of a lively season. The dead heads would become the *clacqueurs* of the gallery, and a papered house would be a thing of the past. As it is, however, if Garrick kicks against his rule, the manager has his say, and the queen of the ballet must descend to the kitchen or don the rags of the beggar at a moment's notice. But there is a limit even to the rights of the theatrical manager. Daly might sue for damages on a broken contract, but he would find it hard to compel his utility man to perform in every role if he did not feel so inclined. Palmer might contract with Charles Thorne to play at his theatre for a certain season,

but it might be doubtful whether he could restrain him from performing elsewhere, if he had made another engagement in the meanwhile. If Miles would refuse to pay the license fee exacted by statute for his theatres, he would not be likely to amuse the public any longer. Such legislation, it is held, is sustainable as a legitimate exercise of the taxing power of the State, and also as part of its police regulations; and in the State of New York it has been decided, that a statute, requiring the managers or proprietors of places of amusement in the City of New York to procure licenses from the mayor, and that he shall pay over the amounts received from them to the treasurer of the society for the Reformation of Juvenile Delinquents for its use, is constitutional and valid. Wallack v. Mayor, 3 Hun. 84. But a license fee in the State of Alabama to keep a theatre would not formerly protect one who, by contract with the licensee, exhibited therein feats of legerdemain or slight of hand. Professor Jacko v. State, 22 Ala. 73 (1853). And it is well to know that in the State of Massachusetts a statute prohibiting the setting up or maintaining without license of any public show, amusement or exhibition does not apply to a school for dancing, even though an admission fee is paid thereto on each evening. Commonwealth v. Gee, 6 Cush. 174 (1850.)

That an actor can not be compelled to perform at a theatre under an engagement for the season, is well settled. Equity will not indirectly enforce specific performance of a contract for personal services, as one writer has it, (2 Story's Equity Jurisprudence, 153, note, 12th ed.); but a suit at law for damages on a broken contract to perform will lie. Id. Whether an actor could be restrained by injunction from performing at one theatre, while under a contract to perform at another, was at first a question of considerable doubt. There are two cases to the contrary, but the vice-chancellor who decided them, reversed the principle in subsequent cases, so that the former can not be regarded as authoritative. Kemble v. Kean, 6 Sim. 333; Kimberly v. Jennys, 6 Sim. 340.

The case of Lumley v. Wagner, 1 De Gex, M. & G. 604, is generally cited as a leading one which established the right of a theatrical manager to restrain by injunction a performer from acting elsewhere, when the contract contained a negative clause. Johanna Wagner and father entered into a contract with plaintiff to sing twice a week during a run of three months, at a salary of $400 a month, to which was added an agreement in French that defendant "engaged herself not to use her talents at any other theatre, etc. without the written consent of plaintiff." Defendant made an engagement to perform at another theatre, and an injunction being asked, was obtained. The lord chancellor cited the case of Kemble v. Kean, *supra*, and said: "I am bound to say that, in my opinion, that case was wrongly decided, and can not be maintained." See, also, Webster v. Dillon, 3 Jur. (N. S.) 432.

The next English case of importance was that of Fechter v. Montgomery, 33 Beav. 22. Defendant, a leading actor of considerable distinction in the provinces, entered into a negotiation with plaintiff, the lessee of the Lyceum Theatre, London, to perform there. Interviews took place between them at which the plaintiff expressed his earnest desire of acting in London in Shakespeare's plays, and said he was willing to make a pecuniary sacrifice for the attainment of that object; he said: "Mr. Fechter, remember I come to you not to be idle, but to act;" to which Mr. Fechter replied, "Certainly, that is so." The plaintiff promised defendant an immediate appearance. The parties shook hands on the bargain. A day or two afterwards the defendant, having expressed a wish that his engagement should be in writing, the plaintiff's agent wrote to him saying: "I am directed by Mr. Fechter to offer to you an engagement at the Lyceum theatre for two years, commencing January 1, 1863, at a salary of £7 per week for the first, and £10 per week for the second year, it being understood that no advantage will be taken of the confidence you have reposed in Mr. Fechter." Defendant accepted this offer, but was not cast for a play. Things ran on for five months or so, and defendant still remained idle, although his salary was paid all along. He then announced his intention to break his contract, and made an engagement to perform elsewhere, when plaintiff sought to restrain him by injunction from so doing, and the court refused to allow it. Here was a somewhat different case from the other two. In Kemble v. Kean, the contract contained a negative stipulation, and the court refused an injunction. In Lumley v. Wagner, *supra*, a case of a similar kind, the court granted an injunction. In this case there was simply a contract to perform, accepted by defendant, but the terms were not all contained in the written contract. There was a reference to an outside verbal agreement between the parties, and by that agreement plaintiff had bound himself to give to the defendant an appearance at the earliest opportunity. Having broken his part of the contract, the court held that defendant was justified in breaking his.

Perhaps the strongest English case upon the subject is that of Montague v. Flockton, 16 L. R, Eq. 189. Defendant accepted an engagement to perform at the Globe Theatre, London, in the following terms: "I accept the engagement for the Globe Theatre under the management of H. J. Montague, at a weekly salary of £5, and if required to go into the provinces, traveling expenses paid and twenty per cent. on my London salary. Line of business, old man and character business." A renewal contract of the above was made at the expiration of the first. The court said in granting an injunction: "It appears to me that an engagement to perform for nine months at theatre A is a contract not to perform at theatre B or any other theatre whatever."

This, then, is the result of the English decisions

upon the subject: that whether there is a contract containing a negative stipulation to perform or not elsewhere, the courts will restrain an actor from performing at another theatre during the existence of the first engagement.

In the earlier American cases it was held that under a contract for theatrical or operatic performances, a court of equity, having no power to compel the performance of the acts, would not interfere by injunction. High on Injunctions, secs., 1163-64, 2nd Ed. It will not be necessary to cite all of the American cases upon this subject. They are numerous and conflicting, but the latter authorities are conclusive upon the point as to the right to obtain an injunction under contracts containing a negative clause. In the following cases, however, where the contracts contained such a stipulation, an injunction was denied. Sanquirico v. Benedetti, 1 Barb. 315; Hamblin v. Dinneford, 2 Edw. Ch. 529; De Polo v. Sohlke, 7 Robt. 280; Burton v. Marshall, 4 Gill, 487: Da Rivafindi v. Corsetti, 4 Paige, 264; while in Hayes v. Willis, 11 Abb. Pr. (N. S.) 167, and Daly v. Smith, 38 N. Y. Superior Court, an injunction was granted. In Butler v. Galleth, 21 How. Pr. 465, the agreement was simply to dance at plaintiff's theatre or where he should prescribe; there were no negative clauses. In denying the motion for an injunction the court said: "I am unwilling to hold, and do not think I am bound to hold, that where there are no clear and absolute negative stipulations on the part of the party upon the subject, involving in part the exercise of intellectual qualities, and a special case of the impossibility or great difficulty of measuring damages is presented, that the jurisdiction to forbid the violation of such covenants does not exist; but the present case is far from being one of such a character, and falls within the authorities of our own State in which an injunction has been refused."

Some of these cases present different phases, and there may be little doubt as to the correctness of the conclusions at which the courts arrived under the peculiar circumstances involved in the application of the remedy. As in Da Rivafindi v. Corsetti, *supra*, where an opera singer had engaged to sing at a certain theatre and not elsewhere, and before that time arrived made an engagement to go to Havana to perform and intended to violate his contract, the court would not interfere because there had been no breach of contract, the time not having arrived for defendant to perform for plaintiff there when the action was brought, and there could be no breach until the engagement commenced. And so in De Polo v. Sohlke, *supra*, an injunction was denied on the ground that the plaintiff did not then have, and was not likely to have, an establishment in active operation, and, therefore, no custom could, for the time being, be withdrawn from them and consequently no damages were resulting or could be anticipated to result for some time to come from the act which plaintiff sought to enjoin. In no instance, as far as we have been able to ascertain, has a case similar to that of Montague v. Flockton been presented to the American courts; and it might be doubtful whether in the absence of a contract not to perform elsewhere an injunction would be allowed; but if we are to take the *dicta* of the courts in Hayes v. Willis and Daly v. Smith, *supra*, as indications of what the law would be if such cases were presented, we should say that the English authorities would be likely to be followed. The main question of course is as to whether damages can or can not be obtained. If so, the remedy by injunction fails. "It is a point to be considered," said the court in Willis v. Hayes, "that when theatrical managers with large capital invested in their business, making contracts with performers of attractive talents, and relying upon such contracts to carry on the business of their theatres, are deserted by their performers in the middle of their season, whether a resort to actions at law for damages must fail to afford adequate compensation."

When it becomes a question between different theatres in the same city, and a leading actor breaks an engagement with his manager and goes over to the rival establishment, we think there can be no doubt that the injunction would lie, whether the contract stipulated that the actor should or should not perform elsewhere. In case of Culwell v. Cline, 8 Mart. (N. S.) 684, containing a contract to perform at a given theatre, but no negative clause, however, an injunction was denied.

As to the conduct of the audience in a theatre, it must be peaceable and orderly as in other assemblies. So far as the spectators themselves are concerned, they have no right to create a disturbance because the prices of admission are exorbitant, as was shown in the case of Clifford v. Brandon, 2 Camp. 358, 10 Cent. L. J., 57; and to use the language of Lord Mansfield there quoted: "Theatres are not absolute necessaries of life, and any person may stay away who does not approve of the manner in which they are managed. If the prices of admission are unreasonable, the evil will cure itself. But the proprietors of a theatre have a right to manage their property in their own way, and to fix what prices of admission they think most for their own advantage." The audience have the right to hiss a bad performance, but they can not conspire beforehand to cry down a performance. Clifford v. Brandon, *supra*; Gregory v. Brunswick, 1 C. & K. 23; Rex v. Forbes, Cr. & Dix, 157. Their "censure or approbation," says Mr. Bishop, "although it may be noisy, must not be riotous. Their censure or approbation must be the expression of the feelings of the moment; for if it is premeditated by a number of persons confederated beforehand to cry down even a poor performance or an actor, it becomes criminal." Bishop's Amer. Crim. Law.

As to the rights of a purchaser of a theatre ticket, the authorities have generally held that he has but a revocable license, subject to the control of the proprietor. In some of the earlier cases a

different doctrine was announced, and the purchase of a season ticket at a theatre, from an agent, held to give an irrevocable right to enter and remain during the performance. Tayler v. Waters, 7 Taunt. 374; 2 Amer. Lead. Cases, 5th ed., 559; 1 Wash. Real Prop., 4th ed., 634. These cases were overruled, however, by the case of Wood v. Leadbitter, 13 M. & W. 387, where the owner of land on which was a stand for the spectators at a horse-race, sold a ticket to plaintiff to enter and witness the race. Before the race was over, without misconduct on the part of the plaintiff, or tendering him back the admission fee, the owner ordered him to leave the premises, and afterwards removed him; it was held that his ticket was a mere license which was revocable. The court being of opinion, that, although a license founded upon and necessary to the enjoyment of a grant would be sustained by the interest given, yet this was only true where there was a valid grant, and did not apply to an oral license, which would be equivalent, if executed, to an estate or easement in the land to which it related; that, as the right which the ticket purported to give of entering on the race-course and remaining there during the continuance of the races, was virtually an easement which could not be granted without a deed; the license was not sustained by an interest, and might consequently be revoked at any time. This decision was followed in McCrea v. Marsh, 12 Gray, 211, and the sale of an opera ticket said to be a grant of a license which might be revoked, and the purchaser excluded from the house without exposing the manager to a liability in tort. In this case the holder atempted to enter the theatre and was prevented from so doing by the manager. The court said, however, that the plaintiff was doubtless entitled to recover in an action of contract the money paid by him for the ticket, and all lawful damages which he sustained by the breach of the contract implied by the sale and delivery of the ticket. In a recent case in the State of Pennsylvania, an entirely different view has been taken of the rights of the holder of a theatre ticket,—a doctrine, perhaps, more consistent with the prior decisions of that State upon the subject; but we were not aware that any of the previous cases had carried the doctrine any furt her than to limit it to those where something had been done under the license, and it was impossible to restore the licensee in *statu quo*, and not to those where the licensee had simply paid a consideration for the license. Huff v. McCauley, 53 Pa. St. In the case of Drew v. Peer, 11 Cent. L. J. 257, a negro and his wife, who had purchased tickets of admission and reserved seats in defendant's theatre, were refused admission and forcibly ejected. Having subsequently brought an action on the case to recover damages, it was held that it was in the proper form to recover the price of the tickets and the loss occasioned the plaintiff by his wife's illness, including all expenses which he was put to in consequence. It was also held that a ticket to a reserved seat in a theatre conferred more than a revocable license, and partook of the nature of a lease entitling the holder to peaceable ingress and egress, and exclusive possession of the seat during the designated performance. As the weight of authority is opposed to this view, (Jamieson v. Milleman, 3 Duer, 255; Prince v. Case, 10 Conn. 378; Jackson v. Babcock, 4 Johns. 418; 1 Wash. Real Prop. 634), we should think that the purchaser of a reserved seat at a theatre, who sells his pass on leaving the house, together with the ticket for his seat, could confer no right on the second purchaser, which would entitle him to admission; it being one of the characteristics of a license, that it is limited to the person to whom it was originally given, and can not be susceptible of transfer or alienation. Licenses are confined to the original parties, and can neither operate for nor against third persons. 2 Amer. Lead. Cases, 5th ed. 549.

W. H. WHITTAKER.

INJURIES RESULTING IN DEATH — EXTRA-TERRITORIAL FORCE OF STATUTES.

DENNICK v. CENTRAL R. CO. OF NEW JERSEY.

Supreme Court of the United States, October Term, 1880.

1. Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties.

2. The plaintiff's husband received injuries in New Jersey, through the negligence of the defendant, which resulted in his death. Letters of administration were granted plaintiff in New York. The statutes of New Jersey and New York, giving a right of action in such cases, are substantially the same. *Held*, that plaintiff could maintain an action in the courts of New York against the defendant for causing the death of her husband in New Jersey.

In error to the Circuit Court of the United States, for the Northern District of New York.

Mr. Justice MILLER delivered the opinion of the court:

The plaintiff in error brought her suit in a State court of New York to recover damages for the death of her husband by an accident on the defendant's railroad. The railroad company entered an appearance and removed the case into the Circuit Court of the United States for the Northern District of New York, on the ground that the plaintiff was a citizen of New York and the defendant a corporation of the State of New Jersey. The complaint filed in the circuit court alleges that plaintiff was a widow and her children were next of kin to the decedent, and that she was administratrix of his estate, appointed by the proper

court in New York. Other allegations showed the death of the husband by negligence of the defendant, and claimed $15,000 damages. The answer of defendant denied the negligence, but admitted the death by the train running off the track in New Jersey, and that there were a widow and next of kin, and that plaintiff had been appointed administratrix by the Surrogate of Albany County, New York. The parties waived a jury, and plaintiff introduced evidence tending to prove the negligence charged, and rested. Whereupon the court ruled that for the loss of her husband accruing in the State of New Jersey, under the special statute of that State on that subject, plaintiff could not recover in that action, and gave judgment for the defendant, to which this writ of error is prosecuted. It is understood that this decision rested solely upon the proposition that the liability for the death of a party by a civil action for damages, under the statute of New Jersey, can be enforced by no one but an administrator or other personal representative of the deceased, appointed by the authority of that State. And the soundness or unsoundness of this proposition is what we are called upon to decide. The statute of New Jersey, under which the action was brought, is as follows: "§ 1. That whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect and default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. § 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person."

It must be taken as established by the record that the accident by which plaintiff's husband came to his death, occurred in New Jersey, under circumstances which brought the defendant within the provisions of the first section of the act making the company liable for damages, notwithstanding the death. It is scarcely contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offense was committed; for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is indeed a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we can not see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial, and the local court in New York, and the Circuit Court of the United States for the Northern District, were competent to try such a case when the parties were properly before it. See Mostyn v. Fabrigas, 1 Cowp. 161; Rafael v. Verelst, 2 W. Blacks. 1,055; McKenna v. Fisk, 1 How. 241. We do not see how the fact that it was a statutory right can vary the principle. If the defendant was legally liable in New Jersey, he could not escape that liability by going to New York. If the liability to pay money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law, and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases. See *Ex parte* Van Riper, 20 Wend. 614; Lowry v. Inman, 46 N. Y. (Court of Appeals) 119; Pickering v. Fisk, 6 Vt. 102; Railroad v. Sprayberry, 8 Baxter (Tenn.), 341; Great Western R. Co. v. Miller, 19 Mich. 305. But it is said that, conceding that the statute of the State of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that State and amenable to its jurisdiction. The statute does not say this in terms. "Every such action shall be brought by and in the name of the personal representatives of such deceased person." It may be admitted that for the purpose of this case the words "personal representatives" mean the administrator. The plaintiff is, then, the only personal rep-

resentative of the deceased in existence, and the construction thus given the statute is, that such a suit shall *not* be brought by her. This is in direct contradiction of the words of the statute. The advocates of this view interpolate into the statute what is not there, by holding that the personal representative must be one residing in the State or appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here also, by construction, "if they reside in the State of New Jersey?" It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference it is opposed to it. The first section makes the liability of the corporation or person absolute where the death arises from their negligence. Who shall say it depends on the appointment of an administrator within the State?

The second section relates to the remedy, and declares who shall receive the damages when recovered. These are the widow and next of kin. Thus far the statute declares under what circumstances a defendant shall be liable for damages, and to whom they shall be paid. In this there is no ambiguity. But fearing there might be a question as to the proper person to sue, the act removes any doubt by designating the personal representative. The plaintiff here is that representative. Why can she not sustain the action? Let it be remembered that this is not the case of an administrator, appointed in one State, suing in that character in the courts of another State, without any authority from the latter. It is the general rule that this can not be done. The suit here was brought by the administratrix in a court of the State which had appointed her, and, of course, no objection could be made. If, then, the defendant was liable to be sued in the courts of the State of New York on this cause of action, and the suit could only be brought by the personal representative of the deceased, and if the plaintiff is the personal representative of the deceased, whom the courts of that State are bound to recognize, on what principle can her right to maintain the action be denied? So far as any reason has been given for such a proposition, it seems to be this: that the foreign administrator is not responsible to the courts of New Jersey, and can not be compelled to distribute the amount received in accordance with the New Jersey statute. But the courts of New York are as capable of enforcing the rights of the widow and next of kin, as the courts of New Jersey. And as the court which rendered the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having control of the administratrix can compel distribution of the amount received in the manner prescribed by that statute. Again, it is said that by virtue of her appointment in New York, the administratrix can only act upon or administer that which was of the estate of the deceased in his lifetime. There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees, and is not subject to sale or distribution in any other mode, as the amount set apart in most of the States to the family, devises of specific property to individuals, all of which can be enforced in the courts; and no reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and the duty of distributing under that law. There can be no doubt that an administrator invested with the apparent right to receive or recover by suit property or money, may be compelled to deliver or pay over, to some one who establishes a better right, or that what was so recovered was held in trust for some one not claiming under the will or under the administrator. And so here. The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say, that when the money recovered in such an action as this came to the hands of the administratrix, her courts could not compel distribution as the laws directs. It is to be said, however, that a statute of New York, just like the New Jersey law, provides for bringing the action by the personal representative, and for distribution to the same parties, and an administrator appointed under the law of that State would be held to have recovered to the same uses, and subject to the remedies in her fiduciary character which both statutes require. We are aware that the case of Woodward v. Michigan Southern R. Co., 10 Ohio St. R. 120, asserts a different doctrine, and has been followed by the cases of Richardson v. New York Central R. Co., 98 Mass. 85, and McCarthy v. Chicago, etc. R. Co., 18 Kas. 46. The reasons which support that view, we have endeavored to show, are not sound. These cases are opposed by the latest decisions on the subject in the Court of Appeals of New York, in the case of Leonard v. The Columbia Steam Navigation Co., not yet reported, but of which we have been furnished with a certified copy.

The right to recover for an injury to the person, resulting in death, is of very recent origin, and depends wholly upon statutes of the different States. The questions growing out of these statutes are new, and many of them unsettled. Each State court will construe its own statute on the subject, and differences are to be expected. In the absence of any controlling authority or general concurrence of decision, this court must decide for itself the question now for the first time presented to it; and with every respect for the courts which have held otherwise, we think that sound principle clearly authorizes the administrator, in cases like this, to maintain the action.

The judgment of the circuit court is, therefore, reversed, with directions to award a new trial.

NOTE.—While the result reached in this case is perhaps in accordance with the weight of authority, it seems to us that the general rule here laid down is much too broad to be supported either on principle or authority. The right to maintain such an action as this outside the State where the injury was inflicted depends upon the character of the statute giving the right of action, as well as upon the laws of the State where the action is brought. Statutes have no inherent extra-territorial force; and "whatever force and obligation the laws of one country have in another, depend solely upon the laws or municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent." Story, Conflict of Laws, sec. 23. The laws of another State are never enforced as a matter of right, but as a mere matter of comity. And this comity is not extended to laws repugnant to the polity, or prejudicial to the interests of the State. Bank of Augusta v. Earle, 13 Pet. 519; Story, Conflict of Laws, secs. 36, 37; 2 Kent Com., 458, and note; Blanchard v. Russell, 13 Mass. 6.

In the absence of express legislation the courts will presume that the legislative branch of the government intended to adopt the generally received principles of comity; but when the legislature declares its will to the contrary, that presumption is at an end. Green v. Van Buskirk, 5 Wall. 307, 312; s. c., 7 Wall. 150; Bank of Augusta v. Earle, *supra;* Thompson v. Waters, 25 Mich. 214. The courts of one State will not enforce the revenue laws of another State. Fant v. Miller, 17 Gratt. 47; Briggs v. Lawrence, 3 T. R. 450; Ludlow v. Van Rensselaer, 1 Johns. 94; Pickering v. Fisk, 6 Vt. 102; Cambioso v. Maffit, 2 Wash. C. C. 98; James v. Catherwood, 3 Dow. & Ry. 190. And where a statute enjoins a duty to be performed by the officers of a corporation, and makes them individually liable for the debts of the corporation, such liability, being in the nature of a penalty, will not be enforced extra-territorially. First National Bank v. Price, 33 Md. 487; Erickson v. Nesmith, 4 Allen, 233; Id. 46 N. H. 371; Halsey v. McL. 12 Allen, 438; Derrickson v. Smith, 27 N. J. L. (3 Dutch.) 166. Numerous other instances might be given, where the courts hold that rights depending on the statutes of other States will not be enforced; but to go in detail into this question would swell this note to unreasonable proportions. In general it may be said that a foreign law will be enforced only "when it embraces and effectuates general principles, known and accepted by the jurisprudence of enlightened nations" (Derrickson v. Smith, 27 N. J. L. 166); and that "comity of nations extends only to enforce obligations, contracts and rights, under the provisions of laws of other countries which are analogous or similar to those of the State where the litigation arises." Hughes v. Klingender, 14 La. Ann. 857. The case of *Ex parte* Van Riper, 20 Wend. 614, cited in the principal case, is not in point. No mere statutory liability was enforced in that case. The liability existed at common law, and the statute was merely declaratory in its nature. Cowen, J., delivering the opinion of the court, said: "The bank might have been a mere partnership or joint stock company, and that, I think, must have been intended upon the language of the application, had it not gone on to show how the liability arose. The common law favors the personal liability of the members, for all the debts of a company. Exemption is an exception, to be shown by the other side. Strictly, therefore, it was not necessary to show at all how Van Riper came to be personally liable." The ground upon which this and other cases like it stand is, that the stockholders stand substantially as partners of an unincorporated association. Corning v. McCullough, 1 N. Y. 47. Lowry v. Inman, 46 N. Y. 119, instead of supporting the principal case, seems to be against it. Allen, J., delivering the opinion of the court, said: "In many charters the intent is obvious to impose an absolute liability on the stockholders. In all such cases the liability is personal, and, following the person, may be enforced as other personal obligations are enforced, and according to the course of procedure in the place where the individual sought to be charged is found. It is not in such case a statutory remedy, or a liability based upon a statute, and which is confined in its operation to the limits of the sovereignty creating the corporation, and without extra-territorial force or obligation. But the charter was not to be one of that character; that it created no right and imposed no obligation disconnected with the prescribed remedy, which was local in its character, and not capable of being enforced without the limits of the State of Georgia. Pickering v. Fisk, 6 Vt. 102, seems equally against the rule it is cited to sustain. There it was held that the courts of Vermont would not entertain a suit on a sheriff's bond given in another State, and it was laid down that "a court can sustain a suit on a foreign contract only when it can be enforced agreeably to the common law."

Great Western R. Co. v. Miller, 19 Mich. 305, was a suit by a passenger to recover damages for being ejected from a train at a distance from any dwelling or usual stopping place. The foreign statute required the carrier to put off a person at a usual stopping place, or near a dwelling-house. The court held simply that no recovery could be based on a foreign statute without pleading it; and, further, that if it should turn out on the trial that plaintiff was a non-resident, the suit should be dismissed, the defendant being a foreign corporation doing business in that State, on the ground that the courts of one State should not take cognizance of mere personal torts committed in a foreign country between non-residents. In Railroad Co. v. Sprayberry, 9 Heisk. 852, the court say: "An action of this character is unknown to the common law, and is only given by

statute; but when such an action is given and a remedy prescribed, that remedy must be personal. As the injury occurred in Mississippi, the right of action and the remedy prescribed by the statute of that State is the one to which the plaintiff is entitled. The statute of this State on the subject has no application." In so far as this case holds that the courts of one State will enforce the remedies provided by the laws of another, even though not in conformity to their own procedure, it is clearly against the leading authorities everywhere, and especially those in New York. The case of Leonard v. Columbia Steam Navigation Co., cited above, and since reported in 12 Cent. L. J. 377, is only authority for holding that an action may be maintained in one State for the injuries resulting in death in another State, where the statutes of both States are similar, and give a right of action. The rule in such cases was laid down by Mr. Justice Story, in Bank v. Donnally, 8 Pet. 372, as follows: "The general principle adopted by civilized nations is, that the nature, validity and interp etation of contracts are to be governed by the laws of the country where the contracts are to be performed. But the remedies are to be governed by the laws of the country where the suit is brought." In cases like the above the right is purely statutory, and all the authorities concur in holding that the remedies given by such statutes are exclusive. In the principal case, the right of action and the remedy were the same in the States where the right accrued and the remedy was sought. But there is great diversity both in the right and the remedy given by the statutes of the different States on this subject. In Massachusetts, New Hampshire and Maine, the forfeiture is recovered by indictment; and if this remedy is exclusive, how could it be enforced in a State where an indictment would not lie for the recovery of the penalty?

In Anderson v. Milwaukee, etc. R. Co., 37 Wis. 321, where an employee was injured in the State of Iowa through the negligence of a fellow-servant, under such circumstances that, by the laws of Iowa, he had a right of action against the defendant (the laws of the latter State having a provision making a railroad company liable for damages sustained by an employee through the negligence of a fellow-servant), it was held that inasmuch as an employee was given no such right by the laws of Wisconsin, its courts would not enforce the right in favor of one injured elsewhere. It was also held by the same court that an action would not lie to recover double damages for cattle killed in Iowa, although the statute of the latter State awarded double damages in such cases, for the reason that such an action was not known to the law of Wisconsin, and because it was an attempt to collect a penalty given by a foreign statute. Bettys v. Railroad Co., 37 Wis. 323. Many of the statutes in the class of cases under consideration are highly penal, imposing heavy penalties, depending in no degree upon the damage sustained. If anything is well settled, it is that no action will lie for a penalty outside the State which imposes it.

M. A. Low.

EQUITY—MISTAKE—LACHES.

CONNER v. WELCH.

Supreme Court of Wisconsin, March 2, 1881.

Where the mortgagee of land purchased it, and assumed the payment of three prior mortgages, and paid them, but was unaware of the existence of the lien of a judgment in favor of the prior mortgagee, subsequent to the three mortgages, which had been assigned to a third party, equity will not relieve him if his ignorance of the lien of the judgment was due to his negligence.

Appeal from Circuit Court, Dane County.

The case established by the pleadings and evidence is correctly stated in the brief of counsel for the plaintiff as follows: "This action was brought to foreclose four certain mortgages made by Martin Osborne and wife upon eighty acres of land in Dane County, three of which mortgages had been satisfied of record before the commencement of the action. The facts are that on November 11, 1871, Martin Osborne was seized in fee of the west half of northwest quarter of section 25, town 8, range 9, Dane County. November 11, 1871, Osborne and wife gave a mortgage thereon to John W. Allen for $800 and interest. This is still in force as a first mortgage on the property, and is not one of the four mortgages for the foreclosure of which the action was brought. It confers a right of property prior to the rights of all parties hereto, and further reference to it in the case is unnecessary. November 23, 1871, Osborne and wife gave a mortgage thereon to Patrick Duffy for $200 and interest. This mortgage bears date prior to the Allen mortgage, but was executed later, and in terms made subject thereto. October 1, 1875, Osborne and wife gave another mortgage thereon to Patrick Duffy for $250 and interest. December 2, 1876, Osborne and wife gave a mortgage thereon to Elizabeth Duffy for $135 and interest. February 21, 1878, Osborne and wife gave a mortgage thereon to Michael C. Conner, the plaintiff, for $229 and interest, which mortgage has never been satisfied of record. March 1, 1878, the defendant, Christian R. Stein, caused judgment to be entered against Martin Osborne in the Circuit Court for Dane County upon a judgment note, with warrant of attorney, by his attorneys, Welch & Botkin, a law firm of which the defendant William Welch was a member. March 2, 1878, the defendant Stein assigned said judgment to said Wm. Welch. March 4, 1878, the said mortgages, numbers two, three and four, for $200, $250, and $135, were assigned to the defendant Stein.

March 5, 1878, the defendant Stein, by his attorneys, the said Welch & Botkin, brought suit to foreclose the said mortgages, numbers two and three, for $200 and $250, making parties defendant thereto Osborne and wife, the mortgagors, and Conner, the plaintiff herein, holding the subsequent mortgage, number five, above mentioned, but not making a party defendant the said Welch, holding by assignment the said judgment number six. March 8, 1878, Osborne and wife, by deed of quitclaim, conveyed said premises to the plaintiff, Conner, who, at the time, had an actual knowledge of the Stein judgment and its assignment to Welch. April 9, 1878, at the office of Welch & Botkin, in the presence of Botkin, the plaintiff, Conner, paid to the defendant Stein the amount, principal and interest, of the mortgages in suit (Nos. 2 and 3), together with about $115, costs of suit. At the time of payment he was still without knowledge of the Stein judgment. Neither Stein nor Botkin spoke of it. Botkin, when asked if he had told Conner of the existence of the Stein judgment, testified: 'I do not think I did. He (Conner) paid the money, and then said that he wanted the mortgages satisfied, and asked Mr. Stein to come right up with him and satisfy the mortgages, at the register of deeds' office, and get done with it; and he and Mr. Stein went out of the office for that purpose. It was at Conner's request. Not a word was said by me or Stein in regard to satisfying. There was not a syllable or whisper in regard to it.' The two mortgages were then satisfied by Stein. April 29, 1878, the plaintiff, Conner, paid Stein the amount, principal and interest, of the mortgage for $135, number four, which, with the accompanying note, was delivered to him. Thereupon, at plaintiff's instance and request, Stein went to the register's office, accompanied by plaintiff, and satisfied the mortgage; Stein, knowing, and the plaintiff not knowing, of the judgment. About December, 1878, the plaintiff first learned of the existence of the judgment from the officer having an execution thereon against this property." The complaint prays that the discharges of the three Duffy mortgages be canceled, and for the usual judgment of foreclosure and sale in respect to those mortgages, and the mortgage for $229 to the plaintiff, dated February, 21, 1878.

It is claimed in the complaint that forty acres of the mortgaged land was the homestead of Osborne, and an injunction was prayed against the sale of such forty acres, on execution issued upon Stein's judgment. As to the agreement between the plaintiff and Osborne, pursuant to which the latter conveyed to the plaintiff the land mortgaged, the plaintiff testified as follows: "I bought the place of Osborne. I was to pay the mortgages. I did not give him any money besides the mortgages. * * * * I gave him an account I held against him, more or less. * * * * He had no money, and I paid for the making out of these papers. Forget how much that was. That is all I paid for his deed to me, except that I released him from his liability on the note of $229. Think it was agreed that I should let Osborne have his note and mortgage. Have no further claim on him or his land for that." The witness testified later, that he understood he took the property in satisfaction of his claims, but that it was no part of the consideration of the deed; and, further, to the question, "Didn't you regard the giving to you by Osborne of the quitclaim deed as, between you and Osborne, a settlement of your note and mortgage against him for $229?" the plaintiff answered: "I presume so, but that was omitted in putting the amount in the deed." This is the substance of all the evidence on the subject.

The court found—"First, that all the facts stated in the complaint are true, except that no part of the mortgaged premises was the homestead of Osborne when Stein recovered his judgment, and that Stein is not the owner of such judgment; second, that the defendant Welch purchased said judgment from the defendant Stein, and took the assignment thereof absolutely, for full value, and without notice, fraud or collusion, and that he paid therefor by crediting the said Stein on the account of the firm of Welch & Botkin, of which the defendant Welch was then and still is a member, with the face amount thereof, towards the payment for legal services theretofore rendered by the said Welch & Botkin for the said Stein, and that, as between the said Welch and the said Botkin, it was agreed that the amount of said judgment should be received by the said Welch on his individual account; third, that Mr. Botkin, the law partner of the said defendant Welch, transacted the business in the foreclosure suits set out in said complaint, and that said Welch had no knowledge of the details of said foreclosure, and of the satisfaction of the mortgages as set out in said complaint; fourth, that the cancellation of the mortgages as set out in said complaint, was founded upon a mistake upon the part of the plaintiff. That mistake was the supposition that the several mortgages of record, including his own, to the amount in all of the full value of the premises, were the only liens prior to his deed from said Osborne."

As conclusions of law, the court found that the mortgage for $229, executed by Osborne to the plaintiff, is a valid subsisting lien on the land; that the discharge of the three Duffy mortgages should be canceled, and those mortgages adjudged to be valid and subsisting liens; and that the plaintiff is entitled to a judgment of foreclosure in respect to all four mortgages, to a sale of the land mortgaged, but not to a personal judgment against either defendant. The defendants have appealed from the judgment entered pursuant to such findings.

Sloan, Stevens & Morris, for respondent; *S. W. Botkin*, for appellants.

LYON, J., delivered the opinion of the court:

As we understand the testimony of the plaintiff,

he accepted the quitclaim deed of the mortgaged premises from Osborne, pursuant to an express agreement between them, that the note and mortgage of February 21, 1878, for $229, was thereby satisfied and discharged. His testimony seems to admit of no other construction. By this agreement the $229 mortgage was discharged, and the satisfactions of the Duffy mortgages by Stein, in the proper records of the county, at the request of the plaintiff, discharged those mortgages. Hence, by the acts and procurement of the plaintiff, the four mortgages in controversy were canceled and cease to be liens upon the land covered by them. Were these subsisting mortgages, we might not find it very difficult to hold, under the authorities cited, that the interest represented by the $229 mortgage was not merged in the legal title conveyed to the plaintiff by Osborne, and that the plaintiff should be subrogated to the rights of the mortgagees in the Duffy mortgages, so that all of these mortgages could be made available to protect the plaintiff against the lien of the Stein judgment, which is junior thereto. But before the questions of merger and subrogation can be raised at all, the mortgages now canceled and discharged must be restored and vitalized. This can only be done by canceling and holding for naught the satisfactions of the mortgages, which the plaintiff caused to be entered of record, and his express agreement with Osborne to accept the conveyance of the legal title in full satisfaction and discharge of the $229 mortgage.

The precise question is, therefore, whether, under the circumstances of the case, the plaintiff is entitled to be relieved of those satisfactions and of such agreement. Has he shown himself entitled to have them set aside, canceled and held for naught? The circuit court found (no doubt correctly) that there was no fraud or collusion on the part of the defendant, Welch, the owner of the Stein judgment, and granted the relief prayed on the sole ground that plaintiff acted in ignorance of the existence of that judgment, in the matter of the satisfaction and discharge of the mortgages. Undoubtedly the plaintiff knew nothing of the judgment, and, presumably, (although he has not so testified), had he known of its existence, he would not have had the mortgages discharged, or made the contract he did with Osborne for the conveyance. But that alone is not sufficient to entitle him to have the discharged mortgages reinstated as valid liens upon the land. He must also have exercised reasonable diligence to ascertain whether subsequent liens had been put upon the property. A court of equity never relieves a man from the consequences of his own culpable negligence. Discussing the rules upon which courts of equity proceed in relieving, or refusing to relieve, against contracts made or acts done through mistake, or in ignorance of material facts, Judge Story says that "where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff in falling into the error, or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed in *statu quo*, equity will interfere, in its discretion, in order to prevent intolerable injustice." 1 Eq. Juris. § 138*i*. In section 146 the learned author says: "It is not, however, sufficient in all cases, to give the party relief, that the fact is material; but it must be such as he could not by reasonable diligence get knowledge of when he was put upon inquiry. For, if, by such reasonable diligence, he could obtain knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence." In a note to the section last cited is the following: "If a court of equity is asked to give relief in a case not fully remediable at law, or not remediable at all at law, then it grants it upon its own terms and according to its own doctrines. It gives relief only to the vigilant, and not to the negligent; to those who have not been put upon their diligence to make inquiry, and not to those who, being put upon inquiry, have chosen to omit all inquiry, which would have enabled them at once to correct the mistake, or to obviate all ill effects therefrom. In short, it refuses all its aid to those who, by their own negligence, and by that alone, have incurred the loss, or may suffer the inconvenience."

In Mamlock v. Fairbanks, 46 Wis. 415, this court made an application of the rule above stated. That was an action to rescind a contract of sale of a certain note and mortgage by the defendant to the plaintiff, and to recover the money paid therefor. The ground upon which relief was claimed, was that the defendant misrepresented the identity of the debtors, which misrepresentation affected the value of the securities. It was held that if, by the exercise of reasonable diligence, the plaintiff had the present means of ascertaining the identity of the debtors, and was not prevented from doing so by any artifice of the vendor, there could be no recovery. The opinion contains some of the authorities for the rule, not specially cited herein, and the case is a very strong one against the plaintiff.

Levy v. Martin, 48 Wis. 198, is not in point. There the mortgage sought to be revived was discharged without the consent of the plaintiff, and against an express agreement between him and the personal representatives of the deceased mortgagor that it should be assigned to him. Under these circumstances we found no difficulty in canceling the satisfaction, and subrogating the plaintiff to the rights of the original mortgagor. There was no question of diligence in the case.

We have examined the cases cited by the learned counsel for the plaintiff on the subject of the rescission of contracts or instruments for ignorance or mistake of material facts, but in none of them, so far as we have perceived, is the question of diligence raised or passed upon.

We are now to consider the question whether the present plaintiff used proper diligence to as-

certain the condition of the title when he made his agreement with Osborne, and when he paid and procured the discharge of the Duffy mortgages.

The plaintiff is a man of some wealth, and is apparently familiar with the usual modes of transacting ordinary business. He evidently knew that a judgment against Osborne would be a lien upon the mortgaged premises, and also the effect upon the title of a discharge of the mortgages. He knew also that Osborne was utterly insolvent and thriftless. The number and amount of mortgages which the latter had put upon his land during the preceding seven years, absorbing its whole value, was sufficient notice to him of Osborne's pecuniary condition. The known insolvency of Osborne would naturally make an ordinarily prudent man more cautious when dealing with the title to his land. Then, again, the mortgage of Allen represented nearly or quite one-half of the value of the land, and was paramount to all the others. Stein is a merchant in Madison, and plaintiff knew him well. It does not appear that he is a dealer in real estate to any considerable extent. The very fact that he had purchased the Duffy mortgages, which were junior to the Allen mortgage, would seem to suggest to a reasonable mind that he must have had some special reason for doing so, and that such reason might well be that he became interested in some way in the land. But these circumstances, suggestive as they were, failed to open the lips of the plaintiff. He made no inquiry concerning the title either of Stein or Botkin or Osborne. Had he done so, and been told that no incumbrance had been placed upon the land subsequent to his mortgage for $229, he might stand in a very different position in this action.

But this is not all. A month after he took the conveyance from Osborne, he went with Stein to the office of the register of deeds to have the latter discharge the two oldest Duffy mortgages, and some weeks later went again to the same office to have the other Duffy mortgages discharged. Of course, he was in close proximity to the office of the clerk of the circuit court, and could easily have gone there and ascertained whether any judgments had been entered against Osborne. It seems to us that common prudence required him to do so, or else to interrogate Stein or Osborne or Botkin as to the condition of the title. Yet he made the agreement, and took the conveyance from Osborne, and procured Stein to discharge the Duffy mortgages, without doing either. He suffered the matter to rest *in statu quo* until an execution was issued on the judgment, and, so far as it appears, first asserted the rights claimed in this action on the day the land was sold by the sheriff under the execution, which was about ten months after the last Duffy mortgage was discharged. Our minds are impelled to the conclusion that, under these circumstances, the plaintiff was guilty of most culpable negligence in failing to inform himself of the existence of the Stein judgment, and hence that he has no standing in a court of equity to obtain the relief he seeks. If there is any case in the books which grants such relief, where the act sought to be relieved against was the result of negligence so gross and inexcusable, we have failed to find it. Certainly, no such case is cited by counsel. The application of this rule may work hardship in some cases; perhaps it does in this case. But the rule requires nothing unreasonable and is a most salutary one. It is infinitely better that men should be held to the consequences of their own culpable carelessness, than that courts of equity should undertake to relieve therefrom. The rule requires reasonable caution and prudence in the transaction of business, and is deeply imbedded in our jurisprudence. It is within the principle and reason of *caveat emptor*. Mamlock v. Fairbanks, *supra*. The abrogation of the rule would tend to encourage negligence, and to introduce uncertainty and confusion in all business transactions.

The judgment of the circuit court must be reversed and the cause remanded, with directions to that court to dismiss the complaint.

BIGAMY—PROOF OF FORMER MARRIAGE—LONG ABSENCE— CONFLICTING PRESUMPTIONS.

REGINA v. WILLSHIRE.

English High Court of Justice, Crown Cases, March 5, 1881.

In 1864 prisoner married E. In 1868 prisoner was indicted and convicted for marrying A, E, his wife, being then alive. In 1879 prisoner married B, and in 1880 he married C. Prisoner was indicted for marrying C in 1880, his wife B alleged to be then alive, and upon the trial the prisoner proved by a witness and the production of the record that in 1868 his first wife E was then alive. The judge at the trial ruled that this was no evidence that E was alive in 1879 when the prisoner married B, and that the prisoner was bound to show that E was alive in 1879 to entitle him to an acquittal. *Held*, that the question was one for the jury whether E was alive or dead in 1879, at the time of the last marriage; and that the conflicting presumptions of the continuance of the life of E after 1868, there being no evidence to the contrary, and of the prisoner being innocent and free to contract the marriage in 1879, were evidence for the jury to consider in determining the question.

Case reserved for the opinion of this court by the Common Serjeant of the City of London:

The prisoner was tried before me at the session of the Central Criminal Court held on the 31st of January last. The indictment charged that he married Charlotte Georgina Lavers on the 7th of September, 1879, and that he feloniously married Edith Maria Miller on the 23d of September, 1880, his wife Charlotte Georgina being then alive. The indictment also charged that the prisoner had

been previously convicted of felony at the Central Criminal Court in the month of June, 1868. A marriage between the prisoner and Charlotte Georgina Lavers on the 7th of September, 1879, and a subsequent marriage between the prisoner and Edith Maria Miller on the 23d of September, 1880, were clearly proved. It was also proved that at the time of the prisoner's marriage to Edith Maria Miller his alleged wife Charlotte Georgina was alive. When the case for the prosecution was concluded, the prisoner's counsel asked the counsel for the prosecution to call a witness whose name appeared on the indictment, but the counsel for the prosecution declined to call him. The prisoner's counsel then himself called the witness, who produced a certificate of the previous conviction of the prisoner for felony in June, 1868. The indictment for this felony and caption were also produced in court by the proper officer at the instance of the prisoner's counsel.

The indictment was for bigamy, and alleged that the prisoner married Ellen Earle on the 31st of March, 1864, and feloniously married Ada Mary Susan Leslie on the 22nd of April, 1868, his wife Ellen Earle being then alive.

The prisoner's counsel contended that he had proved that the prisoner had a wife living in June, 1868, and that, in order to convict the prisoner on the present indictment it was incumbent on the prosecution to show that his wife was dead on the 7th of September, 1879, when the prisoner married Charlotte Georgina Lavers.

Counsel for the prosecution contended that, there being no presumption of law that Ellen Earle was alive on the 7th of September, 1879, when the prisoner married Charlotte Georgina Lavers (the presumption, if any, after seven years being, indeed, the other way), and the *prima facie* case of bigamy, having been clearly proved by the prosecution on the present indictment, the onus was thrown upon the prisoner of showing that Ellen Earle was alive on the 7th of September, 1879, when the prisoner married Charlotte Georgina Lavers. I held that the burden of proof was on the prisoner.

No evidence was offered by the prisoner's counsel that Ellen Earle was alive on the 7th of September, 1879.

There was no evidence that the alleged marriage of the prisoner with Ellen Earle was declared void or dissolved by any court of competent jurisdiction. The prisoner was found guilty.

He was then arraigned on that part of the indictment which charged the previous conviction of felony in June, 1868, and pleaded guilty. I respited judgment. The prisoner remains in jail. The question which I reserve for the opinion of the Court for the Consideration of Crown Cases Reserved is, whether the prisoner has been properly convicted of feloniously marrying Edith Maria Miller, his wife Charlotte Georgina being then alive. WILLIAM THOMAS CHARLEY.

Ribton, for the prisoner. — Upon the present charge as laid in the indictment, it was necessary for the prosecution to prove that the prisoner's marriage with C. G. Lavers was a valid marriage, and that she was alive at the time when the prisoner married E. M. Miller in 1880. There was a previous conviction for bigamy in 1868 charged in the indictment, the prisoner having in 1868 married A. M. S. Leslie, his wife Ellen Earle being then alive, and evidence of this was given upon the present charge. [HAWKINS, J.—The evidence showed that the prisoner married Ellen Earle in 1864, that he afterwards contracted marriages in 1868, 1879 and 1880, and the evidence did not show that Ellen Earle was dead. LOPES, J.—It appears to me that the only legal marriage was that with Ellen Earle, who was shown to be alive in 1868, and that there was no evidence that she was dead.] The presumption of law is in favor of the continuance of a life. [LOPES, J.—In Reg. v. Lumley (11 Cox C.C. 274; Law Rep. 1 C. C. R. 196), it was held that there was no presumption either way, and that it was a question for the jury whether the wife was living or dead.] He referred to 1 Taylor on Ev. 199, and the cases there cited. [HAWKINS, J. — Until a man is proved to be guilty, the presumption is in favor of his innocence. If so, must not the prisoner be presumed to have been innocent of any crime when he contracted the marriage in 1880.] In this case the prosecution was bound to prove that C. G. Lavers was the lawful wife of the prisoner as alleged in the indictment, and if they failed to prove that, the prisoner was entitled to be acquitted. The 19 Car. 2, c. 6, s. 2, fixed the period of seven years for the duration of the presumption of life of persons beyond the seas or absenting themselves, upon whose lives estates depended, in the absence of evidence as to their being alive. [Lord COLERIDGE, C. J.—Need you contend further than this? The prisoner is proved to have married a woman in 1864, and three was evidence that she was alive in 1868, and in order to convict upon this indictment it was necessary to show that she was dead in 1879, and there was no proof of this.] Ellen Earle was proved to be alive in 1868, and in the absence of any evidence to the contrary, the presumption is that she was alive in 1879. The *onus probandi* that she was then alive was not thrown upon the prisoner, as ruled by the learned Common Serjeant.

Poland (*Montagu Williams* with him) for the prosecution.—The conviction is right. There was a *prima facie* case proved against the prisoner. The prisoner in 1879 married C. G. Lavers *in facie ecclesiæ*, and that must be presumed to have been a valid marriage until there was evidence given that it was not a valid marriage. The prisoner must be taken to have then represented himself as free to marry. The presumption therefore arises that, when he married in 1879, he did not commit a crime. It was for the prisoner to displace this *prima facie* case by evidence, and it is submitted that he did not do so by showing that, eleven and a half years before, viz., in 1868, he had a wife living. [Lord COLERIDGE, C. J.—The

learned Common Serjeant ruled that the prisoner was bound to show that Ellen Earle was alive in 1879. He did not leave it to the jury to say whether, upon the conflicting presumptions, she was then alive or dead.] The 24 & 25 Vic., c. 100, sec. 57, sanctions the presumption that seven years' absence of a wife, not known to be living, prevents a second marriage from being a bigamous one, should it turn out that in point of fact she was living at the time of the second marriage. [Lord COLERIDGE, C. J., referred to Doe v. Nepean, 5 B. & Adol. 86.] The Common Serjeant left the facts to the jury, with the direction that, under the circumstances, the *onus* of proving that Ellen Earle was alive in 1879, was upon the prisoner. In this case, Ellen Earle had not been heard of. [Lord COLERIDGE, C. J.—That the prosecution did not show.] The learned counsel then referred to Rex v. Twyning, 2 B. & Ald. 386, the marginal note of which is: "The law always presumes against the commission of crime, and therefore where a woman, twelve months after her first husband was last heard of, married a second husband, and had children by him, it was held on appeal that the sessions did right in *prima facie* presuming that the first husband was dead at the time of the second marriage, and that it was incumbent on the party objecting to the second marriage, to give some proof that the first husband was then alive."

Lord COLERIDGE, C. J.—I am of opinion that this conviction can not be sustained. The facts are short, and it appears that there was an undoubtedly valid marriage contracted by the prisoner in 1864, and there was some evidence given at the trial that the wife was alive in 1868. I carefully abstain from saying that she was proved to be alive in 1868, but there was some evidence of the presumption that she was alive in 1868. Then, in 1879, the prisoner contracted a marriage *in facie ecclesiæ*, and it is said that it is to be presumed that that was a valid marriage. Now the prisoner is indicted in respect of his marriage in 1880, and the marriage in 1879 is relied upon to show that the marriage in 1880 was illegal. Upon the trial of the indictment the prisoner showed a valid marriage in 1864, and gave some evidence of the presumption that the woman he then married was alive in 1868, thus setting up a life in 1868 which, in the absence of any evidence to the contrary, must be presumed to be continuing in 1879, no evidence of any kind being given, but it being shown simply that the woman was alive in 1868. It is said that the fact of the marriage in 1879 shows either that the prisoner must have stated that he was an unmarried man and free to marry then, or that the presumption that the prisoner was then innocent of any crime, was sufficient to rebut the presumption of the continuance of the life of the woman he married in 1864. I agree that this conflict of presumptions was sufficient to raise a question of fact for the jury to determine whether that woman was alive in 1879, or whether the prisoner told a falsehood when he was married in 1879, but the learned Common Serjeant did not leave that question to the jury. He ruled that, besides showing the existence of the life in 1868, the prisoner was bound to prove that it continued till 1879. There is no such rule of law. The prisoner was not bound to do more than set up the life in 1868, which would be presumed to continue, and it was for the prosecution to show by evidence that the presumption was rebutted. It was for the prosecution to determine the life; not for the prisoner to show its prolongation. I am therefore of opinion that this ruling was wrong, and that the conviction can not be sustained.

The other judges concurred.

FRAUDULENT PREFERENCE—GRANTEE'S KNOWLEDGE—EVIDENCE.

RECHLING v. BYERS.

Supreme Court of Pennsylvania, 1880.

To establish a fraudulent preference, proof of the knowledge of the grantee must be shown.

Error to the Court of Common Pleas of York County.

Edward W. Spangler, Esq., and *Messrs. Cochran & Hay*, for plaintiffs in error; *W. C. Chapman, Esq.*, for defendant in error.

GORDON, J., delivered the opinion of the court:

"A volunteer," says the learned judge of the court below, "who buys with notice of the intended fraud, can not hold the property against the creditor whose debt has been delayed or hindered, even although he may have paid its full value. But where the creditor takes the property to secure his debt, the transaction is not void, although he may have full notice that the debtor prefers him to his other creditors, and that other creditors must lose in consequence of such preference. Indeed, where property conveyed is not worth more than the existing indebtedness, it would be difficult to conceive a case in which fraud under the statute of 13 Elizabeth could be established. But when, as in the case before us, a note is held by the vendee and applied only in part payment of the property, and cash is paid for what is due in excess of the note, and the jury is of opinion that the cash payment is not *bona fide*, but made only to deceive and cover up a fraud upon the creditors of the vendor, what is the effect? I instruct you that it would render the whole transaction void, because fraud vitiates everything it touches; and although you may be of opinion that the note was honestly held; yet, if you shall further believe from the evidence that the money was not honestly paid, then the purchase would be fraudulent and void, as against the creditors of Wm. H. Taylor." With the above as a general statement of law governing cases of

fraud arising under the statute of 13 Elizabeth, no fault can be found; the difficulty arises in its application to the case in hand. It does not seem to be questioned but that Isaac Taylor was a *bona fide* creditor of his son, W. H. Taylor, and as such, the learned court concedes, his son might have preferred him over other creditors, even though he had full notice of such preference. It follows: "If Isaac Taylor's motive in the purchase of the property in controversy was the security of his own debt, his purchase can not be impeached though he may have paid the difference botween the amount of the note due him and the price agreed upon for the property in money. In this we look to the motive of the creditor; if that was honest and lawful, the intent of his debtor does not enter into the question. As was said by Mr. Justice Coulter, in Scott v. Huleger, 2 Har. 238: "One man can not be prejudiced by the fraud of another, of which he has no notice, nor opportunity of receiving notice." It is true, indeed, if the intention of the parties was not only to secure the note due to the father, but, also, to put the balance of the property into such a shape that it could not be reached by the son's creditors, then, as to such creditors, the whole transaction would be void. But of such intention we can find no evidence. The defendants offered to prove, and did prove, that William H. Taylor said: "I wouldn't have sold it;" that is, the property in controversy, "only to get out of paying the bail money to Brinton." This was all very well in order to show the motive by which William H. Taylor was actuated in the transfer of his property; but it does not affect Isaac, unless he knew of this fraudulent design at the time of the consummation of the sale. So well did the counsel for the defendant know that this evidence, standing alone, would come to nothing, that the offer under which it was admitted, was supplemented by a proposition to prove a fraudulent collusion between William H. Taylor and his father. No effort, however, was made to fulfill this proposition; hence, the proof adduced was but an isolated link in a proposed chain of evidence which was never completed, and therefore, utterly worthless; and so the court should have treated it. Battles v. Loudenslager, 3 Nor. 446. Not only was there no evidence that this alleged fraudulent intention of William H. Taylor had been communicated to his father, either before or after the sale, but it was even shown that the father knew that his son had been sued on the Brinton note, in which he was surety for A. B. Kurtz. Indeed, for aught that appears, he was wholly ignorant of the claim, which, it is now said, he colluded with his son to avoid. But, as we have already intimated, had he known the fact of his son's suretyship for Kurtz, and that Brinton was about to obtain judgment, that would not have rendered his purchase void, if, in making it, his intent was to secure his own debt, and not to hinder, delay or defraud Brinton. So, that Isaac Taylor borrowed part of the money to pay off the balance of the purchase-money, from his daughter, Mrs. Meredith, was of no kind of significance. What if this money was that which she had just received from her brother, and was part of that which he had that day, received from his father? Her claim was an honest one; no one doubts that fact; one on which she had a right to receive the money paid to her, and there was surely nothing wrong in her loaning it to her father. It is a mere trifling with the principles of justice, to allow a circumstance such as this, in itself so fair and proper, to be used to stamp a transaction, otherwise honest and lawful, with the character of fraud. Business dealings between parent and children, and other near relatives. are not, *per se*, fraudulent. They must be treated just as are the transactions between ordinary debtors and creditors. As in the latter case, when the *bona fides* of such transactions is attacked, the fraud alleged must be clearly and distinctly proved, so likewise in the former. We have but to say in conclusion, that as there was, in this case, not even a scintilla of evidence tending to involve the assignor of the plaintiff in the alleged fraud, the court should have affirmed the plaintiff's first point—that is, "that under all the evidence given in this case, the verdict should be for the plaintiff."

The judgment is reversed, and a new venire ordered.

ABSTRACTS OF RECENT DECISIONS

SUPREME COURT OF THE UNITED STATES

October Term, 1880.

VENDOR'S LIEN—ASSIGNMENT OF LITIGIOUS RIGHT—REINSCRIPTION OF MORTGAGE UNDER LOUISIANA CODE. — Joseph Cucullu, plaintiff, mortgaged his plantation to Villavaso and subsequently sold it to Walker. Walker, the vendee, with the consent of Villavaso, assumed the debt and lien to him, and gave the vendor notes secured by lien for unpaid instalments of purchase money. In a suit by Cucullu to have his equity declared the prior incumbrance, it was *held*, 1. That Hernandez, to whom Villavaso's notes had come by several assignments, had a lien under the original mortgage, by which they were secured prior to Cucullu's lien for unpaid purchase money, notwithstanding the original mortgage had not been reinscribed according to the Louisiana statute, such reinscription being required to preserve the lien only as against third parties, and not as against the parties to the mortgage. 2. That article 3063 of the Louisiana Civil Code, discharging a surety by the giving of time to the debtor does not apply to a case where the vendee assumes payment of a mortgage, previously given by his vendor, the relation of principal and surety

not existing in such a case. 3. That a purchase of an interest in a suit after judgment, is not a purchase of a litigious right, nor can a defendant who, instead of paying the price of the transfer, contests the suit, avail himself of the privilege given by article 2652, allowing a release to the party against whom a litigious right has been transferred by paying the real price of the transfer. Affirmed. Appeal from the Circuit Court of the United States for the District of Louisiana. Opinion by Mr. Justice WOODS.—*Cucullu v. Hernandez.*

UNITED STATES MARSHAL—POWERS IN BANKRUPTCY UNDER A WARRANT OF SEIZURE.—The plaintiff in error, as Marshal of the United States, acting under a warrant of seizure which had issued against the property of some bankrupts by the district court, under sec. 5023 Rev. Stats., seized eight packages of goods. For this act he was sued in the State court by the defendant in error, who recovered judgment against him for their value, which judgment was finally affirmed by the New York Court of Appeals. The defense was that the goods were the property of the bankrupts, and were lawfully seized under the warrant for provisional possession. There was evidence tending to show that the goods, which were shown beyond question to have been the property of the bankrupts, had been sold a few days previously to the plaintiffs, and were in their possession at the time of the seizure; and there was other evidence that this sale was in fraud of the bankrupt law. The case was tried before a jury, and the court instructed *inter alia* that: "Under a warrant of the kind in evidence * * * * he [the marshal] has authority to take goods belonging to a bankrupt which are in his possession. He has no authority under such a warrant to take goods from a third person, having possession for himself, of the goods and claiming as a matter of right to be entitled to their possession." The court *held* this charge to be error; and *held, further*, that, as the marshal acts upon his own responsibility in making such seizures, consequently he is entitled to show the state of the title of the property, if sued in trespass by the party who is dispossessed by him, contrary to the rule usual in trespass cases. Reversed. In error to the Superior Court of the City of New York. Opinion by Mr. Justice MILLER. —*Sharpe v. Doyle.*

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—REPEAL OF LEGISLATION GIVING A REMEDY TO CREDITORS OF MUNICIPALITIES.—A judgment creditor of the City of New Orleans caused the judgment to he registered under the act of the legislature of 1870, known as Act No. 5 of the extra session, which provided that when a judgment was so registered, a warrant should issue upon it to the treasurer, and that if there were funds specially designated and set apart for the purpose, in the annual budget, it should be paid; and if the amount designated for such purpose should have been exhausted, that the common council might, if they deemed proper, appropriate money from the funds set apart for contingent expenses a sufficient sum to pay the judgment; and that if no such proposition is made by the common council, then judgments shall be paid in the order in which they are registered. Under the delusive hope of payment which, in the language of the court, "flitters" around this unique arrangement, the plaintiff had her judgment registered, and upon being refused payment out of the contingent fund, came into court and asked for a *mandamus* upon the authorities to compel them either to pay it from the contingent fund, or to levy a special tax for the purpose. The respondents upon the return of the writ set up as a defense the fact that there were no contingent funds from which they could pay this judgment, and that they had no power to levy a special tax to pay this judgment. The court sustained a demurrer to this return, holding that while it is true that the taxing power belongs exclusively to the legislative department of a State, and when delegated to a municipality may be revoked by the legislature, yet such power of revocation can not be so exercised as to impair the obligation of existing contracts of the corporation or their means of enforcement, and that therefore the act of 1870 prescribing certain modes of obtaining and registering judgments against New Orleans, and the subsequent act of March 6, 1876, offering to the city creditors a compromise by which the order of payment of the debts was to be determined by lot, and repealing the power of the city council to levy a tax to pay the claims of those creditors who might not accept the compromise offered, are invalid, in so far as they impair the means of enforcement of the contracts existing at the time of their enactment, and a *mandamus* to compel the levy of a special tax to pay a debt of the city may be issued. United States v. New Orleans, 98 U. S. 381. Reversed. In error to the Circuit Court of the United States for the District of Louisiana. Opinion by Mr. Justice FIELD. Mr. Justice HARLAN concurred in the general tenor of the opinion, but dissented from some references made to the case of Merriwether v. Garret [12 Cent. L. J. 19].—*United States v. New Orleans.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

January, 1881.

MANDAMUS—OFFICIAL FEES—REMEDY TO RECOVER.—Upon a petition for a writ of *mandamus*, brought by a justice of an inferior court, in his personal capacity, against the city auditor of Boston, acting as county auditor, and the board of aldermen, acting as county commissioners for the County of Suffolk, the presiding justice found

that the petitioner had performed certain services relative to the commitment of insane persons, under Statutes 1879, c. 195, as set forth in his petition; that the charges made by him, if authorized by the statutes, were proper and reasonable, and should be allowed; that the petitioner had in due form presented his bill for these services, both to the city auditor, acting as county auditor, and to the board of aldermen, acting as county commissioners for Suffolk County, requesting them to examine, audit and allow the account; that they had refused to allow the account, not on the ground that the services had not been performed, but, as was agreed and admitted, solely on the ground that, as matter of law under the statutes of the Commonwealth, the county was under no legal obligation to pay for said services. Upon the case being reported to the full court, it was *held*, that the merits of the case could not be determined in this form of proceeding. If the petitioner is entitled to the fees which he claims, the amount thereof being fixed by statute; and the City of Boston being bound by the Gen. Stats. c. 17, sec. 6, to pay them, he is entitled to recover them by action at law against the city in the inferior court of appropriate jurisdiction. The Statutes of 1879, c. 256, sec. 1, by which it is enacted that "the auditor of accounts of the City of Boston shall be the auditor of the County of Suffolk, and hereafter all bills for county salaries, expenses, and disbursements shall be examined, audited and allowed by the said auditor prior to the payment thereof," is intended to regulate the internal administration of municipal affairs, and does not deprive a creditor of his right of action, at least after his claim has been presented to the auditor and to the board of aldermen acting as county commissioners. Petition dismissed. Opinion by GRAY, C. J — *Wheelock v. Auditor.*

MORTGAGE — FIXTURE — DRILL.—The defendant company having purchased machinery, including a drill, to be used in the manufacture of a patented machine, made an arrangement with S to hire his shop; and in anticipation of its occupancy, S was authorized by the company to remove, and did remove the machinery to his shop and set it up ready for use. After said drill was thus set up, S used it, but not in the business of said company, and thereafter mortgaged his shop "with all the fixed and movable machinery," etc. to the plaintiff bank, which at the time had no knowledge of the state of the title as to said drill as between S and said company, but supposed it belonged to S, their officers having seen it upon the premises at the time they examined the same with reference to making the loan to S on said mortgage. Said drill was a large, heavy machine, from six to eight feet high, having a base of cast iron, and weighing about a ton. It was firmly fastened to the floor, and was supported by braces attached to the flooring above. *Held*, that said drill passed to the plaintiff under its mortgage, as a part of the realty. Opinion by ENDICOTT, J.—*Southbridge Sav. Bank v. Stevens Tool Co.*

FIRE INSURANCE—CERTIFICATE OF MAGISTRATE — WARRANTY — REPRESENTATION.—1. A requirement of a fire insurance policy that the assured shall produce a certificate of the loss, made by a magistrate "not concerned in the loss as a creditor," can not be supposed to disqualify every magistrate who may chance to be a creditor, even to a small amount, of the assured. The purpose of the requirement is to obtain the statement of a reputable person who has no personal interest in the policy which may tempt him to state what is not true. 2. A statement in a policy, written in midsummer, that the buildings were used for the storage of ice, is not a warranty that ice was actually stored in the buildings at the moment of issuing the policy, but is descriptive of the business ordinarily done in them; and being operative, in this sense, as a part of the policy, would prevent any liability of the defendant for loss, in case the buildings should be used during the term of the policy for a business more hazardous than that of storing ice. 3. Where the application for such policy has been made in writing to the defendant by an insurance broker, a representation by the clerk of said broker to the agent of the defendant, that the buildings were full of ice, though false, would not vitiate the policy. Opinion by SOULE, J.—*Dolliver v. St. Joseph F. & M. Ins. Co.*

FRAUDULENT CONVEYANCE — QUITCLAIM DEED.—Under the rules, that when land conveyed in fraud of creditors is taken on execution as the property of the fraudulent grantor, the creditor, in order to establish his title against one holding the record title, must prove, when there is no express or implied trust, that the latter either participated in the fraudulent purpose of his grantor, or that the deed to him was without consideration and wholly voluntary; and that the title of one who purchases of a fraudulent grantee, before the land is specifically attached under the statute, is good against the creditors of all previous owners—in the absence of such evidence, the fact that the tenant acquires his title from a fraudulent grantee by a deed of release and quitclaim, is immaterial, except as bearing upon the question whether the tenant was a purchaser in good faith. Opinion by COLT, J.—*Mansfield v. Dyer.*

SUPREME COURT OF MISSOURI.

February, 1881.

TRUSTS—CONVEYANCE BY HUSBAND TO WIFE IN FRAUD OF CREDITORS.—In 1860 S and wife conveyed certain land to M C, the mother of S, she paying no consideration for the land, and there was abundant evidence showing, the object of the conveyance was to defraud the creditors of S; and also other testimony to show, its object

was to secure the land to the wife of S, because her money had originally purchased it. No trust was declared in the deed. The evidence also showed that J C, the appellant, being the owner of several tracts of land, to defrand his creditors, had conveyed them to M C, also his mother, in June, 1861, the deed expressing a consideration of $125, but no money having in fact been paid, M C making her note to J C for $500, and that sum was allowed him against the estate of M C after her death, and no fraud was proved in obtaining that allowance. In 1867, J C administered on the said estate, and having obtained the above allowance, procured an order of sale of probate court, the regularity of which is not questioned, to sell the lands to pay the debts, his being the only debt; and under that order the lands conveyed by S and wife to M C, were sold to one P for $500; and the lands which had been conveyed to M C by J C, were nominally sold to one D, who really purchased for J. C, and afterwards, by the latter's direction, conveyed them to D C. J C and D were cognizant of the transactions between S and wife and M C, and knew that the latter paid nothing for the lands. The circuit court made a decree vesting the tracts conveyed by J C to M C in the plaintiff, the daughter of S and wife, who brought this suit to charge it with the sum of $500, being the proceeds of the sale of the lands conveyed to M C by S and wife, and sold at the administration sale to P. *Held*, reversing the circuit court, that declarations of trust in land can only be manifested by some writing signed by the party who is enabled to declare such trust. W. S., p. 655, sec. 3. The deed from S and wife to M C was an absolute one, and no trust was expressed in favor of the grantors; and if there was any trust in favor of the wife of S, it rested in parol, and was void under the statute. Besides, the deed was made in fraud of creditors, and a husband can not, to their prejudice, settle on his wife, without a valuable consideration, property that may have come to him by means of the marriage. Potter v. McDougal, 31 Mo. 70. Even if the $500 could be regarded as a trust fund, there was no evidence to show its investment in the land decreed to plaintiff. Reversed and remanded. Opinion by HENRY, J.—*Green v. Cates.*

March, 1881.

STATUTORY CONSTRUCTION — IMPEACHING WITNESS—EVIDENCE.—The act of the legislature of March 31, 1874, which provided that: In all cases of the sale of personal property, the same shall be subject to execution against the purchaser on a judgment for the purchase price thereof, and shall, in no case, be exempt from such judgment and execution for the purchase price as between vendor, his assignee, heir, or legal representative and purchaser, *held* not to give a lien on the thing sold so as to bind it in the hands of any person to whom it might be transferred, but its only effect was to prevent the purchaser from claiming such property as exempt from execution. Section 2353 of Rev. Stats., however, has a much broader scope. Where a witness whose depositions have been taken appears and testifies at the trial, it is competent, for the purpose of impeaching him, to read in evidence such portions of it as may be desired, the other side being then entitled to read the remainder. Prewitt v. Martin, 59 Mo. 325. On a suit on an indemnity bond, executed to the sheriff, on which the plaintiff brought suit for wrongful seizure, under execution, of his billiard tables, as the property of J S, *held*, that evidence to show that, after the tables had been seized by the sheriff, J S secretly, and without the consent of the sheriff, sold certain fixtures belonging to the table, was rightfully excluded; the fact that J S wrongfully took the property from the possession of the sheriff could not, of itself, affect the plaintiff's title, nor could it diminish the amount of his recovery on the bond. Affirmed. Opinion by HOUGH, J,—*Norris v. Brunswick.*

ESTOPPEL — FALSE REPRESENTATION AS TO TITLE.—Plaintiff was applied to by defendant for information as to the title of S to the property in dispute, and he replied that "the title was good so far as he knew." Defendant relying on this information purchased the property. At the very time that plaintiff made the above response, he had in his possession a certificate of purchase of the lots in question, and had been the possessor of it for a year previous. The reason assigned by plaintiff for the statement he made was, that at the time he made it he held some 150 or 200 tax certificates, and did not then know, nor did he know until at or after the time he obtained his deed, that the lots sued for were included in such certificates. *Held*, that plaintiff is estopped from claiming the lots as thoroughly, as though every word he uttered were known by him at the time of its utterance to be absolutely false, since the evidence clearly shows that he knew defendant was about to purchase of S, had come to plaintiff for information, and relied on the information he was thus obtaining. Burrows v. Lock, 10 Ves. 470; Slim v. Croucher, 1 DeG. F. & J. 518; Bigelow on Estoppel, 473 *et seq.*; 1 Story's Eq. Jur., sec. 193. Affirmed. Opinion by SHERWOOD, C. J. RAY, J., absent.—*Raby v. Williams.*

SUPREME COURT OF KANSAS.

April, 1881.

EVIDENCE — PRACTICE — NEGLIGENCE. — 1. Where a question is proper, but the answer contains testimony irrelevant or incompetent, the remedy of the party injured thereby is a motion to strike out such testimony. Hynes v. Jungren, 8 Kas. 391; Stone v. Bird, 16 Kas. 488. 2. When a city in grading a street leaves a high and steep embankment in the street without railing, light or other guard or warning to prevent those passing on such street from falling off such embankment,

it may be adjudged guilty of negligence, although the width of the cut and the height of the embankment was established by the council, and although the work of grading was done in a proper and careful manner. The negligence consists not in the plan of the work or the manner in which it was done, but in the failure to provide suitable protection against accident after the work of grading had been finished. Whether such omission to provide railing, etc., was in any given case negligence, depending as it does upon many considerations, such as the amount of travel on the street, etc., is a question of fact for the determination of a jury. 3. A party has a right in a jury trial to have answers returned to specific questions as to material facts, and a denial of this right is error. Bent v. Philbrick, 16 Kas. 190. 4. What is a material fact is a question to be determined by the court. 5. When the court has decided to submit a question, ordinarily the jury should be required to answer it before they are discharged. 6. A failure to compel an answer is in effect a withdrawal of the question, and is the same as though the court had refused to submit it in the first instance. 7. Notwithstanding a refusal to submit a proper question or a failure to compel an answer thereto, if the answers returned to the other questions, together with the undisputed facts of the case compel just such a general verdict as is returned, the error is not such a one as requires a setting aside of the judgment and the granting of a new trial. Affirmed. Opinion by BREWER, J.—*Wyandotte v. Gibson.*

BILL OF LADING — DRAFTS — STOPPAGE IN TRANSITU —RIGHT OF CONSIGNEE.—1. As between the owner and shipper of the goods and the common carrier, the bill of lading fixes and determines the duty of the latter as to the person, to whom it is, at the time, the pleasure of the former, that the goods should be delivered. But there is nothing final or irrevocable in its nature. The owner of the goods may change his purpose at any rate before the delivery of the goods themselves, or of the bill of lading to the party named in it, and may order the delivery to be to some other person. 2. W & W, bankers at Irving, Kansas, were the *bona fide* holders of two drafts drawn against three shipments of grain shipped to H at Atchison, Kansas, by the Central Branch Union Pacific Railroad, with the bills of lading assigned, to secure the payment of the drafts. *Held*, that they had a lien upon the grain in the hands of the consignee, and can recover from him the proceeds of the grain, to the extent of such drafts, even though the consignor be indebted to the consignee on general account. Affirmed. Opinion by HORTON, C. J.—*Halsey v. Warden.*

ATTACHMENT — PARTNERSHIP INTEREST.—1. An officer holding an order of attachment against the property of an individual partner, may levy such attachment on the interest of such partner, and take the partnership property, or a portion thereof, into his possession, and sell the interest of the partner in such property. 2. And where the officer gives notice that he will sell the entire property, but does not do so, but afterward delivers the property to a receiver, at the instance of the complaining party: *Held*, that the officer does not, by giving such notice, render himself or the plaintiff in the attachment liable to an action for damages. Affirmed. Opinion by VALENTINE, J. *Herschfield v. Claflin.*

EQUITABLE TITLE — ENCUMBRANCING. — 1. When a party has a bond for a deed of real estate, or a land contract for the conveyance from the legal owner, upon the payment of certain installments, and is in possession of the land, and has paid interest on the purchase money, he is the equitable owner thereof and has such an interest therein, that he can use it to secure a loan, and for that purpose may encumber such interest by an ordinary real estate mortgage. 2. E held such a land contract and executed a mortgage on the land to secure certain sums of money, then sold the land to one L, and assigned in writing to him the contract with the legal owner; out of the money paid by L to E as assignee of E's contract, obtained a deed of conveyance from the legal owner. The mortgage executed by E was duly filed for record prior to the sale to L. *Held*, the mortgage was a valid encumbrance upon the land and L purchased the same subject to the mortgage lien. 3. In an action to foreclose the mortgage, evidence showing the value of improvements placed upon the land by L would not tend to sustain a defense, that the land was fraudulently included in the mortgage or that the mortgage lien did not cover the land, or that it had been paid. Affirmed. Opinion by HORTON, C. J.—*Laughlin v. Braley.*

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

23. On the 15th of September, 1880, one W discounts a note in bank, and the bank gives him in payment a draft on New York. In the course of four days the bank discover the notes they discounted for it were forged notes. They immediately stop payment of the draft in New York. In the meantime it indorses the draft to K, and K indorses it back to W. On the 31st of October, 1880, W indorses it to a bank at Parkersburg, W. Va. They forward for collection, payment is refused, and draft protested. The Parkersburg Bank sue the maker G. Can it be collected, and did they not take the draft subject to all defenses? Did not the draft become the draft of W, being indorsed twice by him, and not the draft of G, and was not the draft kept out of circulation too long, or long enough, to be notice to an indorsee? E.

QUERIES ANSWERED.

Query 22 [12 Cent. L. J. 383.] A sells B a tract of land upon credit; executes a deed which is duly recorded, and in the deed reserves a specific lien on the land for the unpaid purchase-money. After the sale, a railroad is constructed through the land by a deep cut. To this railroad, B, who is in possesssion, gives the right of way. For years the railroad company fail to finish the road. In the meantime A files his bill, has the land sold (without notifying the railroad company, to enforce his lien); at the sale buys back the land and has title vested in him, leaving B largely indebted to him upon the original debt. The railroad company now propose to complete the road. Have they any title to the right of way? If not, what is A's remedy against them? L.

Answer. The reservation of the vendor's lien in the deed is, to all intents and purposes, a mortgage upon the land. Markoe v. Andras, 67 Ill. 34. B's grant of the right of way is subject to this mortgage, and the foreclosure proceeding extinguished the legal title of B and his grantees. The railroad company not having been made a party defendant to the foreclosure suit, would still have the right of redemption in equity. Dunlap v. Wilson, 32 Ills. 517. But until they institute proceedings for this purpose, A, of course, can enforce his legal title against it by ejectment. R. A. L.

Clinton, Ills., April 23, 1881.

CORRESPONDENCE.

REMOVAL OF CAUSES — COUNTERCLAIM.

Editor Central Law Journal:

In reading the case decided by Judge Treat, in JOURNAL of April 22 (Fall Wire Mf'g Co. v. Broderick), the facts seem to be: Suit brought in State court for $300; counterclaim $1,000, against which, in State court, a motion to dismiss should have been sustained, if filed. Before any motion or reply was filed, and on the day following filing of counterclaim, petition of removal was filed and case removed. Motion to remand argued and sustained.

The United States Court having to pass on the question of what would be the effect of a motion in Federal court to dismiss counterclaim, found a question of seeming great complexity, and unraveled it by saying: "The question of the amount involved is to be determined from the plaintiff's demand, and not from the counterclaim." There is no doubt but that the court properly remanded the case; but the court losing sight of the proper solution of the puzzle, arbitrarily legislated in order to decide the case rightly. The fact was, that there was no denial of the counterclaim, no adversary proceedings, and thereby no controversy; there being no controversy, the case was not properly removable. Therefore it was not necessary to decide that the right of removal is to be based on plaintiff's petition; the act of Congress does not so limit it, and other judges have decided that when there is a controversy based on counterclaim of over $500 in excess of plaintiff's claim, that the case is removable in cases like the one under discussion. Is it not so?

E. F. WARE.

Fort Scott, Kan.

REPORTING OPINIONS OF SUPREME COURT.

Editor Central Law Journal:

On page 289 of the present volume of the JOURNAL, speaking of the law recently made by the Missouri Legislature empowering the judges of the Supreme Court to deliver written opinions only in such cases as they may consider of sufficient importance to justify reporting, you say: "The results of this measure are likely to be such that it will be regarded as a great boon by the profession."

It is seldom that I am constrained to differ from the sentiments expressed in your excellent journal; but in reference to this matter, my opinion is so strongly the other way, that I feel it a duty to express my dissent. It seems to me that the legislature has committed a very grave error. The publication of the opinions of our appellate courts, and the consequent criticism to which they are subjected, is a great safeguard. The consciousness that every opinion is to be laid before the entire bar, and that any departure from precedent or the correct rules of decision will be infallibly detected, must necessarily stimulate the judge whose name is to be attached to the opinion, to the utmost care in reaching his conclusions. On the contrary, if the judge knows that a hastily prepared decision may, if wrong, be buried in the pigeon hole, he will, at least so long as he is human, too often yield to the temptation to slight his cases. Rapidity in disposing of work is of much importance. But it is of much greater importance that the decisions should be right.

I believe that this practice in the court of appeals has led to very mischievous results. Let any one overhaul the unpublished decisions of that court, those of which only a very meager syllabus is published at the end of our reports, and he will be astonished at the amount of bad law and the evidence of hasty conclusions that he will find there. I am firmly of the belief that one chief reason why the Supreme Court gives greater satisfaction than the court of appeals is because of the feeling at their bar that the latter can't render many decisions that its judges never intend shall see the light except through the outline contained in your JOURNAL.

I hope this matter will be agitated. I would like to learn the opinion of the bar on the subject.

ZETA.

St. Louis, April, 20 1881.